TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~561.~~ 309 102

THE MERCANTILE MUTUAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. FOLSOM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 19, 1871.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Benjamin F. Folsom and The Mercantile Mutual Insurance Company, a manifest error hath happened, to the great damage of the said The Mercantile Mutual Insurance Company, as is said, and as appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the third Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Ccourt of the United States, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-sixth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

b UNITED STATES OF AMERICA,
South'n Dist't of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the south'n distri't of New York, in the second circuit, by virtue of the within writ of error, and in obediance thereto, do hereby certify that the foregoing pages, numbered from one to 77, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of The Mercantile Mutual Insurance Company, plaintiff in error, vs. Benjamin F. Folsom, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 9th day of December, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the said United States the ninety-sixth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5 cent int rev. stamp, cancelled.]

(Indorsed:) U. S. Supreme Court. The Mercantile Mutual Insurance Company, plaintiff in error, vs. Benjamin F. Folsom, defendant in error. Writ of error. Filed Nov. 27, 1871. Scudder & Carter, attorneys for plaintiff in error.

The within writ of error is allowed.
November 27th, 1871.

SAM'L BLATCHFORD, *D. J.*

1 Circuit court of the United States for the southern district of New York.

Pleas before the judges of the circuit court of the United States for the southern district of New York, at the city of New York, of the April term, in the year of our Lord one thousand eight hundred and sixty-nine.

Witness, Hon. Lewis B. Woodruff, circuit judge.

KENNETH G. WHITE,
Clerk, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the first Monday in June, as yet of the April term, in the year of our Lord one thousand eight hundred and sixty-nine, before the judges of the circuit court of
2 the United States for the southern district of New York, at the court-rooms, in the city of New York, came Benjamin F. Folsom, by Blatchford, Seward, Griswold, & De Costa, his attorneys, and brought unto the said court, before the aforesaid judges thereof, then and there, according to the statute in such case made and provided, his certain declaration against The Mercantile Mutual Insurance Company, having been summoned, &c., if a plea of trespass on the case upon promises, which said declaration follows in these words, that is to say:

3 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Benjamin F. Folsom, who is a citizen of the State of Pennsylvania, plaintiff in this suit, by Blatchford, Seward, Griswold & De Costa, his attorneys, complains of The Mutual Insurance Company, a corporation duly created by and under and in pursuance of the act of the legislature of the State of New York entitled "An act to incorporate the Mercantile Mutual Insurance Company," passed April 12th, 1842, and the act amendatory thereof, entitled "An act to amend the act entitled an act to incorporate the Mercantile Mutual Insurance Company, passed April 12th, 1842," passed April 13th, 1855, and having its principal place of business in the city, county, and State of New York, defendant in this suit, who was summoned to answer the said Benjamin F. Folsom of a plea of trespass in the case upon promises.

For that whereas, heretofore, to wit, on the first day of March,
4 1869, at the city of New York, within the southern district of New York aforesaid, the Mercantile Mutual Insurance Company, the defendant, in consideration of the premises, viz, the sum of three hundred and sixty dollars lawful money of the United States paid to it by the plaintiff, did promise to insure, and did make insurance and cause to be insured, the said plaintiff, on account of whom it may concern, in case of loss, such loss to be paid in funds current in the city of New York to him the said plaintiff, upon the body, tackle, apparel, and other furniture of the schooner "B. F. Folsom," at and from the first day of January, 1869, at noon, until the first day of January, 1870, at noon, in the sum of three thousand dollars, (the said vessel or schooner being valued at the sum of 35,000 dollars,) against the perils of the seas and other perils, and thereupon the said defendant did, on the said first day of March, 1869, and at the city of New York aforesaid, make and deliver to the said plaintiff its certain time-policy of insurance
5 in words and figures following, to wit:

And the said plaintiff further says that at the time of the

making and delivery by the said defendant to the said plaintiff of the aforesaid policy of insurance, the loss of the said schooner or vessel, as hereinafter stated, was unknown to both the said plaintiff and the said defendant, and that the said policy of insurance was so made and delivered as aforesaid for the purpose of effecting an insurance on the said schooner or vessel whether lost or not lost at the time of effecting the insurance in manner aforesaid, and at the time of issuing by the defendant of the policy aforesaid.

And thereupon the said defendant became insurers to the said plaintiff for the sum of three thousand dollars in manner and form aforesaid.

6 And the said plaintiff further says that he, the said plaintiff, was at all times from the time of the attaching of the said policy of insurance, to wit, from the first day of January, 1869, and from thence continually afterwards until and at the time of the loss hereinafter mentioned, interested in the said schooner or vessel in the said policy of insurance mentioned, exceeding the value and amount of all monies by him ever insured or caused to be insured thereon.

And the said plaintiff further says that heretofore, to wit, on the sixth day of January, 1869, the said schooner or vessel departed and set sail from the port of Boston, in the State of Massachusetts bound on a voyage to the port' of Montevid'o and Buenos Ayres, in South America, laden with a cargo of general merchandize. That the said cargo laden on board of said schooner, and the said voyage on which the said schooner set sail, was neither a cargo nor voyage which by the terms of said policy of insurance the said plaintiff had warranted that

7 the said schooner should not carry or make.

And the said plaintiff further says that afterwards, and whilst the said schooner or vessel was proceeding on her said voyage, and during the continuance of the risk in the said policy of insurance mentioned, to wit, on or about the 13th day of January, 1869, the said schooner or vessel was, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the force and violence of the winds and waves, wrecked, foundered, and sunk, whereby the said schooner or vessel was and became wholly lost to the plaintiff, but which said loss did not become known to the plaintiff until on or about the 10th day of March, 1869; of all of which several premises the defendant afterwards, to wit, on the 6th day of April, 1869, at the city of New York aforesaid, had notice, and were bound by the terms of the said policy of insurance to pay to this plaintiff, thirty days after the aforesaid notice, the said sum of three thousand dollars so insured by it aforesaid, but to pay which said sum the said defendant, though duly

8 requested, after the lapse of the said thirty days, to wit, on the 7th day of May, 1869, at the city of New York aforesaid, has refused, and still does refuse, to pay, to the damage of this plaintiff in the sum of six thousand dollars.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of three thousand dollars, of like lawful money as aforesaid, for so much money before that time paid, laid out, and expended by the said plaintiff, to and for the use of the said defendant, and at the like special instance and request of the said defendant.

And being so indebted, the said defendant in consideration thereof afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised

9 the said plaintiff well and truly to pay unto the said plaintiff the

said sum of money last above mentioned when the said defendant should thereunto be afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of three thousand dollars of like lawful money as aforesaid, for so much money before that time had and received by the said defendant to and for the use of the said plaintiff. And being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendant should be thereupon afterwards requested.

10 And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid. accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of three thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last above mentioned when he, the said defendant, should be thereunto afterwards

11 requested.

Nevertheless the said defendant, although often requested so to do, hath not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff; but to pay the same or any part thereof to the said plaintiff, the said defendant hath hitherto altogether refused, and still doth refuse, to the damage of the said plaintiff of six thousand dollars, and therefore the said plaintiff brings suit, &c.

And now, at this day, that is to say, on the 28th day of July, in this same term, until which *which* day the said defendant had leave to impart to the said declaration, and then to answer the same before the judges of the said circuit court aforesaid, at the court-rooms, in the said city of New York, came as well the said plaintiff, by his attorneys aforesaid, as the said defendants, by Messrs. Scudder & Carter, its attorneys. And the said defendant, by its said attorneys, comes

12 and defends the wrong and injury when, &c., and says that it did not undertake or promise, in manner and form as the said plaintiff hath above thereof complained against it; and of this it puts itself upon the country. And the said plaintiff does the like, &c.

Therefore, the issue above joined is ordered by the circuit court of the United States for the southern district of New York to be tried at the circuit court appointed to be held at the court-rooms, in said city of New York, in and for said southern district, on the 3d day of January, in the year of our Lord one thousand eight hundred and seventy-one, as yet of the October term, in the year of our Lord 1870.

At which day and place last above*d* mentioned, before the honorable Samuel Blatchford, one of the judges of said circuit court of the United States for the southern district of New York, according to the

13 form of the statute in such case made and provided, comes as well the above-named plaintiff as the above-named defendant, by their respective attorneys above mentioned, and who, by written stipulation duly made and filed with the clerk of the said court, in pursuance of the statute in such case made and provided, waived a trial by jury of the issue above joined, and which said stipulation is in the language following, to wit:

"It is hereby stipulated that the issues of fact herein may be tried and determined by the court without the intervention of a jury, in accordance with the provisions of the act of March 3d, 1865."

And, thereupon, the said court, without the intervention of a jury, in pursuance of the statute in such case made and provided, tries the said issue and finds that the said defendant did undertake and promise, in manner and form as the said plaintiff hath above complained

14 against him. And the court assesses the damages of the said plaintiff, by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, to three thousand three hundred and forty-eight dollars and twenty cents, (3,348.20.)

Therefore, it is considered that the said plaintiff, Benjamin F. Folsom, do recover against The Mutual Insurance Company, the said defendant, his said damages by the court aforesaid, in form aforesaid, assessed, and also the sum of two hundred and sixty-five dollars and thirteen cents for his costs, charges, and interest by the said court here adjudged of increase, to the said plaintiff, and with his assent; which said damages, costs, charges, and interest, in the whole amount to the sum of three thousand six hundred and thirteen dollars and thirty-three

15 cents, ($3,613.33.) And the said defendant in mercy, &c.

Judgment signed this sixteenth day of November, 1871, &c.

(Signed) R. E. STILWELL,
Deputy Clerk.

16 (Indorsed:) U. S. C. C. S. D. N. Y. Benjamin F. Folsom against The Mercantile Mutual Insurance Company. Judgment record. Blatchford, Seward, Griswold, & De Costa, att'ys for plaintiff, 29 Nassau st., New York. Filed Nov. 17, 1871.

17 United States circuit court, southern district of New York.

THE MERCANTILE MUTUAL INSURANCE COMPANY
ads.
BENJAMIN F. FOLSOM.

The issue of fact raised by the pleadings herein was brought on for trial at a stated term of this court, held on the third day of January, in the year 1871, by Samuel Blatchford, esq., judge of the district court of the United States for the southern district of New York, without a jury, a trial by jury having been waived in due form by the consent of the parties. The plaintiff's counsel, to prove the issue on the part of the plaintiff, produced a policy of insurance, the making and delivery of which was admitted on the part of the defendant, and the same was read in evidence, and was as follows:

18 VESSEL ON TIME.

No. 3.] *By the Mercantile Mutual Insurance Company.* [No. 14,625.

B. F. Folsom, on account of whom it may concern in case of loss to be paid in funds current in the city of New York, to him, do make insurance and cause to be insured, at and from the first day of January, 1869, at noon, until the first day of January, 1870, at noon; if on a passage on the expiration of the term, with liberty to the assured to renew the policy for one, two, or three months, at the same rate of premium, if application be made to the company on or before the expiration of the first term. The risk, however, is to terminate at any port at which she may first arrive during the said extended time, on her being moored therein twenty-four hours in good safety; a pro rata premium to be returned for each entire month not entered upon of the extended time, no loss or contribution being claimed. Warranted not to use ports on the continent of Europe north of Hamburg, nor to go east of Navarino, in the Mediterranean, during the period insured; nor ports on the continent of Europe north of Antwerp between 1st November and 1st March; nor ports in the British North American Provinces, except between the 15th May and 15th August. Also warranted not to use the West India Islands during the months of August and September. Also warranted not to use ports and places in Texas, except Galveston; nor foreign ports and places in the Gulf of Mexico; nor places on or over Ocracoke Bar; nor any of the West India Salt Islands; nor ports or places on the west coast of America north of Benicia during the period insured; nor to use Min River nor Torres Straits. Each passage subject to separate average. Warranted not to carry lime under deck.* Warranted not to carry grain in bulk, except from the ports of New York, Philadelphia, Baltimore, or San Francisco, and in all cases not to exceed, in tons of 2,240 pounds, one-half the registered capacity under deck tonnage, and the loading to be under the inspection of a surveyor appointed by the board of underwriters for that purpose. The vessel is not to proceed to sea with grain in bags or bulk on board without a certificate from such inspector that the vessel is properly laden and fitted for her intended voyage. Also warranted not to load, in tons of 2,240 pounds, more than her registered capacity under deck tonnage, with lead, marble, coal, and or iron, on any one passage. Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade; but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage. Upon the body, tackle, apparel, and other furniture of the good sch'r called the B. F. Folsom,

*Except coastwise U. States.

Warranted not to carry petroleum oil or its products (except refined oil in soldered cans in cases) under deck.

Warranted by the assured not to use any of the Guano Islands, nor to load petroleum oils in barrels under deck.

whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said vessel, tackle, &c., hereby insured, are valued at thirty-five thousand ($35,000) dollars, without any further account to be given by the assured to the assurers, or any of them, for the same.

Touching the adventures and perils which the said Mercantile Mutual Insurance Company is contented to bear and takes upon itself in this voyage: they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes or people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said vessel, or any part thereof. And, in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants, and assigns, to sue, labor, and travel, for, in, and about the defence, safeguard, and recovery of the said vessel, or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured; nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; having been paid the consideration for this insurance by the assured, or assigns, at and after the rate of twelve per cent. net, privileged to cancel at the expiration of six months, pro rata premium to be returned for time not used, no loss being claimed.

Warranted by the assured free from any loss or expense arising from, or in consequence of, capture, seizure, or detention, or any attempt thereat, by any nation, state, people, or persons whatsoever.

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said , (the amount of the note given for the premium, if unpaid, being first deducted,) but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. In case of claim for loss or damage, a deduction of one-third from the cost of repairing or replacing the same shall be made after deducting the value of the old materials, except in the case of anchors, and of sheathing of copper or other metal; a deduction of one-fortieth from the expense of repairing or replacing the metal sheathing, or any part thereof, (after first deducting the value of the old metal and nails,) shall be made for every month since the vessel was last sheathed until the expiration of forty months, after which time the cost of remetaling, or repairing the same, shall be wholly borne by the assured. If a technical total loss be claimed, similar deductions shall be made from the estimated repairs, and unless the net cost thereof would exceed a moiety of the value of the vessel

Proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken.

after making such deductions, the loss shall be deemed partial only. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance apon the premises aforesaid, prior in day of date to this policy, then the said Mercantile Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Mercantile Mutual Insurance Company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises subsequent in day of date to this policy, the said Mercantile Mutual Insurance Company shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said Mercantile Mutual Insurance Company shall not be liable for more than a ratable contributiou in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It is also agreed that the property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. And it is further agreed that in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining her value shall be her valuation in this policy; and if not valued herein, then her actual value at the time of the inception of this risk at the port to which she then belonged. And lastly, it is agreed that if the above vessel, upon a regular survey, should thereby be declared unseaworthy by reason of her being unsound, or rotten, or incapable of prosecuting her voyage on account of her being unsound, or rotten, then the assurers shall not be bound to pay their subscription on this policy.

In witness whereof the president or vice-president of the said Mercantile Mutual Insurance Company hath hereunto subscribed his name, and the sum assured, and caused the same to be attested by their secretary in New York, the first day of March, one thousand eight hundred and sixty-nine.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers.

$3,000. Three thousand dollars.

President.

Secretary.

(Signed) A. G. MONTGOMERY, JR.,

V. President.

(Signed) C. Y. DESPARD, *Secretary.*

19 (Indorsed:) Mercantile Mutual Insurance Company. March 1st, '69. B. F. Folsom. One year from Jan'y 1st, '69. Vessel on time. Schr. B. F. Folsom. $3,000 a 12 per cent. net, $360; policy, 1.25—$361.25. Record E. Folio 14625. Wreaks & Walsh. John H. Duyckinck, stationer, 164 Pearl street. [March, 1869.]

20 The plaintiff's counsel further, to prove the said issue on his part, then read in evidence the deposition of John Orlando; which was as follows:

I am aged 43 years, and reside at West Yarmouth, Massachusetts. I am a master-mariner, and have followed the sea for 28 years. I am now temporarily in the port of New York, and expect to go to sea on Monday, April 18th, bound on a voyage to Nassau, N. P., and back again. I was the master of the schooner B. F. Folsom. I superintended her building in 1865, and was her master from that time until she was lost in 1869. I was her master on the voyage on which she was lost. Her last voyage was from Boston, bound to Montevideo and Buenos Ayres. She left Boston on her said last voyage on January 6th, 1869. Her cargo consisted of lumber and assorted cargo. At the time the schooner left Boston she was in every respect seaworthy, and properly equipped and manned.

We left Boston on the 6th of January, 1869; the wind was
21 from the westward, and finally increased to strong breezes, lasting until January 12th, when it became a gale, the sea running very high; I expected to heave her to during the coming night, and therefore double reefed the spanker and mainsail, and furled them up, and set single-reefed foresail and fore-stay sail. That was the only canvas she then had up. We ran under that canvas until about midnight, when I came on deck, and ordered the mate to sound the pumps; he did so, and we found two feet of water in the hold; called all hands and manned the pumps; all hands pumped until 5 a. m. the following day, viz, January 13th. We then sounded the pumps, and found that the water had gained on us 1 foot, we finding 3 of water in her. Seeing that we could not clear her by pumping, I ordered that portion of the cargo that would sink to be thrown overboard, in order to lighten the schooner, and save her, if possible, from sinking. Between times
22 of heaving cargo overboard we also pumped, until, between 5 and 6 p. m., our patent iron pumps became choked with sand ballast, and became entirely useless. Then we continued working the forward wooden pump, and heaving cargo overboard, until 10 o'clock p. m., when she filled with water, and became unmanageable. I then ordered preparations to be made to cut away the main and mizzen masts. She was a three-masted schooner. The main spring-stay and the main and mizzen lanyards were cut away, when the schooner filled and fell on her port side, and thereby carried away her main and mizzen masts, and their rigging. Then she righted up, pretty near upright, all her hull being under water, except a part of her bow. We let the anchors and chains go, to lighten her up forward. In that condition the

schooner remained, and we staid on her for twenty days and twenty nights, when we were taken off and rescued by the Bremen schooner "Cornet," bound for Bremen. We were, when disabled, in long. 45 deg. W. and lat. 36½ N., and drifted to the eastward all the time after
23 we were disabled. I don't know what caused her to leak. It was in her bottom. The schooner, before we discovered the leak, had been laboring and straining hard. The reason the schooner did not sink entirely was because she had lumber in the lower hold. After we had been water-logged for six days, the upper deck broke, and the between-decks cargo came out. Nothing was saved from the wreck, not even the ship's papers or log-book. I do not know what has become of the schooner. When I left her she was all under water, except part of the bow. All my crew were rescued by the schooner Cornet, and were all taken to Bremerhaven. We arrived there on February 18, 1869.

Q. On your arrival at Bremerhaven did you communicate with your owner, the plaintiff herein; if so, when and how?

A. I arrived there on the 18th of February, and on the 20th I wrote the plaintiff a letter, to go by the first steamer; which I believe left on that day.

Q. Look at the letter now shown, and say whether it is the letter referred to by you in your previous answer.

24 A. It is; and the envelope now shown me was the envelope which enclosed the letter; both the letter and the address on the envelope are in my handwriting. (The letter and envelope are marked with the initials "S. & C. & C. M. Da C., April 16th, 1870.")

Q. Did you, while at Bremerhaven, write any other letter to the plaintiff?

A. Yes, sir; by the next steamer, about a week after. The letter now shown me is my second. It is all in my handwriting, also the envelope. (The letter and envelope are marked with the initials "S. H. & C. & C. M. Da C., April 16th, 1870, No. 2.")

Q. When and how did you leave Bremerhaven?

A. By the Am. steamer Arago, bound for New York; left about March 6th. I had no money to pay my passage, nor could I borrow any. I was a perfect stranger there; and my owner had no friends or credit there. When I arrived I gave the captain of the Arago an order on the plaintiff, my owner, for my passage-money. The above two letters were the only ones I wrote to the plaintiff from Bremerhaven.

25 Q. Did you send any telegraphic dispatch to the plaintiff, or to any one from Bremerhaven or elsewhere?

A. I did not; I had no money. The dispatch had to be prepaid. I never thought of telegraphing.

Cross-examination:

Q. Had you any interest in the schooner B. F. Folsom, and what?

A. Yes, sir. I had $\frac{1}{32}$ in my name. I had owned it ever since she was built.

Q. Who owned the balance?

A. B. F. Folsom had $\frac{1}{8}$; A. C. Hall had $\frac{1}{16}$; Joseph C. Carpenter had $\frac{1}{16}$; Mrs. Mary S. Crowell, $\frac{1}{64}$; William Bright had $\frac{3}{16}$; George H. Crowell, $\frac{1}{16}$; R. M. Heslen, $\frac{3}{64}$; and Miss Fessenden Crowell, $\frac{1}{32}$.

Q. Who was the managing owner?

A. I was the managing owner, ship's husband, and agent; had been so ever since she was built.

Q. Was she an American vessel?

A. Yes, sir; built at Delaware. She had an American register from Baltimore, Maryland.

Q. Are you an American citizen?

A. Yes, by naturalization.

26 Q. What is your birth-place?

A. Sweden.

Q. How long had you commanded the B. F. Folsom?

A. A little over three years. She was launched in November, 1865.

Q. Had you commanded any vessels previously?

A. Yes, sir; the schooner Julia Smith. I commanded her for five years, a little over. The brig Rolson, I commanded her a little over three years.

Q. How recently had the B. F. Folsom been repaired previous to her last voyage?

A. She was on the ways at Boston, and had her bottom painted just previous to taking in her cargo on her last voyage. She didn't need any repairs, except little bits of repairs on deck.

Q. Were you able to take observations while you were water-logged?

A. No, sir; we had no instruments.

Q. How many had you in crew?

A. There were eight, all told, including myself.

Q. What was the size of your schooner?

A. It was 393 tons.

Q. Had you insurance on your share?

27 A. No, sir.

Q. Did you know what insurance there was on the vessel?

A. I did not. I did not know there was any insurance at all.

Q. Had the vessel been insured on your previous voyages?

A. I did not know.

Q. You did not know whether it was the practice of any of the owners to insure?

A. Yes, sir. Mr. R. M. Heslen told me, about a year ago, he had her insured for one trip I made up the Mediterranean.

Q. Had none of the other owners ever told you they had insurance?

A. No, sir.

Q. Which one of the owners were you in the habit of communicating with in reference to the use of the vessel?

A. I had written principally to Mr. B. F. Folsom. I always communicated with the others, too. In regard to settling, I made out a check to each of the owners at the end of each trip, and wrote to them, enclosing it.

28 Q. Had you ever, on any previous voyage, met with any disasters on this vessel?

A. No, sir.

Q. How many days did you remain in Bremerhaven?

A. 16 days. I did not leave it until I sailed in the Arago.

Q. Do you know the name of the captain of the Cornet?

A. Let me think. I have got his name at home. I remember that his last name is spelt with two "n n." He was a native of Bremerhaven. He spoke English. I don't speak or understand German. I had never been in Bremerhaven before. I went to the American consul on my arrival in Bremerhaven to report my loss. His name is Specht. I told him about loss of the schooner, and told him of arrival of the crew, and applied to him for assistance. I noted the protest before him on the 19th February, the day after I arrived. I guess we extended the protest on the 19th and noted it the 18th, the same day we arrived. We had

a first mate on the Folsom; his name was Harrison. We had no
29 other officer. There was, besides, four seamen, a boy, and a steward. I spoke of the loss of the Folsom among the people in the place there. I applied to no one but the consul. There were no American merchants there to my knowledge. Harrison and the rest of the crew came with me in the Arago to New York. We put up in a boarding-house in Bremerhaven, appointed to us by the American consul. Before leaving Boston the plaintiff and the other owners knew that I was going on that voyage.

Q. Do you know whether the news of the loss of the B. F. Folsom was published in the newspapers in Bremen?

A. No, sir; I do not. I didn't hear any one tell about it, and I can't read German.

Q. Had you a number for your vessel?

A. No number in colors. The number of her was on the ship's beam. I don't think there was a number; it was the tonnage burnt on her beam by the custom-house officials.

Q. Had you no means of communicating with other vessels by
30 signals what the name of your vessel was?

A. No, sir.

Q. Did you know what her signal-number was?

A. She had no signal-number.

Q. Had she not a number on her register?

A. I never noticed it; she had no number, to my knowledge.

Q. What is the usual voyage for such a vessel as the B. F. Folsom on a voyage from Boston to Montevideo?

A. From 50 to 75 days.

Q. What is the usual weather at the period of the year you started at on that voyage?

A. We expect it pretty rough till we enter the trade-winds.

Q. Have you made that voyage before?

A. No, sir.

Q. Have you, since the loss of this vessel, heard which of the owners were insured?

A. No, sir; I have not. I heard that Mr. Folsom had part insured, but he never told me of it.

Q. Have you seen him since your return?

A. Yes.

31 Q. Have you not visited some insurance companies for him since your return?

A. No, sir.

Q. Do you know what this suit is about?

A. I heard he had some insurance, but he never told me how much nor anything about it.

Q. Has the plaintiff told you what this suit is about?

A. He wrote to me once that he expected to have a lawsuit about insurance; but he is a man of such *a* few words he never explained himself.

Q. Have you got that letter?

A. No, sir. I don't know where it is now. It is a long time since then. It was some time last summer. I think he said he expected to have a lawsuit with the insurance company, and had no money to spare to buy another vessel.

Q. Had he any interest in the other vessels you commanded?

A. No, sir. I have not seen him since he wrote that letter to me.

Q. Had you any private name between you when you spoke of this schooner?

32 A. Yes. We sometimes used to call her the "B. F." between ourselves.

Q. I understood you to remark that your interest in the B. F. Folsom was mortgaged to the plaintiff. How was that?

A. Yes, sir. I borrowed money of him when I built the vessel, and I gave a mortgage deed on my part of the vessel. It was part unpaid, and he still held it. He had insurance on that part from the vessel first sailed, all the time at my expense. There was between $6,000 and $7,000 due on it when the vessel was lost. That was entirely independent of his one-eighth. The mortgage was past due.

Q. Do you know if any person in Bremen or Bremerhaven transmitted the news of the loss of this vessel?

A. No, sir.

Q. Was the voyage on which this vessel was lost more dangerous in your estimation than her other voyages?

A. No, sir. I considered it safe, because she had a light cargo on board.

Q. Had you any interest in her cargo?

A. Yes, sir. I bought two whale-boats and her deck-load of white-pine lumber, and I had no insurance on either. Nothing what-
33 ever was saved from the vessel except the rags we were in.

Q. Do you know if any of the other owners were interested in her cargo?

A. No, sir; not any. I know that positive.

Q. On the passage from the wreck to Bremerhaven did you communicate with any vessel?

A. No, sir.

Q. Do you know as a fact whether the news of your loss was communicated in any manner other than by your letter?

A. No, sir; I do not.

Q. Had you, on any previous voyage, communicated with your owners by telegraph?

A. Never, except from Boston to Philadelphia, and never on any voyage.

Q. Has the schooner B. F. Folsom ever been known or spoken of to your knowledge as the Orlando?

A. No, sir.

Q. Do you know whether it is usual or not, in cases of loss such as this, for master' of vessels to communicate on their arrival in any ports with underwriters or insurance agents there?

34 A. It is not, to my knowledge. I never lost a vessel except this; therefore I don't know.

Q. Do you know whether it is usual, in cases of loss like this, for the master to communicate the intelligence of the loss in the most expeditious manner to the owners?

A. Yes; of course. I knew that which I done, as I wrote him the letter as soon as the mail could go.

Redirect:

Q. You stated, on your cross-examination, that when on the wreck you did not take any observations because you had no instruments. Do you mean that on the voyage referred to the schooner left Boston without instruments on board, or that while the schooner was a wreck and submerged you were unable to get at the instruments, if on board?

A. I mean we had all the proper nautical instruments and charts on board, but that when the schooner was water-logged they were all de-

stroyed, being below deck; and hence could not get at them to use them.

35 The plaintiff's counsel, further to prove the said issue on his part, then read in evidence two letters from John Orlando to the plaintiff, and the envelopes enclosing them, which were as follows:

BREMERHAVEN, *February the 20th*, 1869.

Mr. B. F. FOLSOM,
Philadelphia, Pa.:

DEAR SIR: In my disstress I got to report to you that 7 days out from Boston the sch. B. F. Folsom sprang a leack; that in spit' of all our pumping & t'rowing cargo overboard for 22 hours, she sunk opper ducks to *to* the watter, & fell on her beam-ends. I cut away the main & mi'zen mast, & remen'd on the wrack 20 long days and 20 long nights without food, & with our clothing wet all the time; in rain-storm, snow-storms, exposed to all the N. W. gales of wind. We were all mos' dead when we were taken of'; had been living on nothing but raw salt
36 beeff & raw salt pork, & very short allowance *on* that. I have to-day extended the protest. The mail-boat, a Bremen boat, is l'iving to-day for New York, but she will not tack me on board unles' I pay me passage. I got no money, & got to waint to the Baltimore boat get in. If she do' not take me without paying my passage, then I got to draw on som' one of you. I must get hom' in some shap'.

Respectfully,

JOHN ORLANDO.

The envelope enclosing the above was addressed as follows:

Mr. B. F. FOLSOM,
Philadelphia, U. S. A.

It was postmarked Bremerhaven, 20, 2, '69, and further postmarked New York, Mar. 9, and was also stamped with the impress of F. W. Specht, U. S. consular agent, Bremerhaven.

37 BREMERHAVEN, *Feb'y 26th*, 1869.

Mr. B. F. FOLSOM, *Philadelphia, Pa.:*

DEAR SIR: I am sick, and have been sick for severell days, still I will try to give you a full acc. of particulars of the missfortune of sch. B. F. Folsom, as I had no time to do it before the mail closed last time. A Bremen steamer will leave here to-mor'ow for New York. I cannot go in her; she will not take me less than full passage, 166 Bremen dollars, and the counsull tells me a' American steamer, Arago, will leave here on the 6th of March, & and that she will, no doubt, take me for half price, & perhaps for nothing.

Seven days out from Boston, during the time experienced heavy weather from the westward. On the 13 of January 12 midnight sounded the pumps & found 2 feet watter in the vessell—all hands pumping till 5 a. m., when it had gained on us nearly one feet, being
38 nearly 3 feet watter in the hole—commenced lighter ship, or rather pi'cking cargo overboard, and pumping untill between 5 & 6 p. m., when our pattent iron pumps chocked with sand-ballast, & becam' entirely useless—six feet watter in the hole; then we man'd the forward wooden pump; but the watter gaining fast on us—the vessell being under short sails, single reeffed foresail & fore-stay sail only; at 10 p. m. she filled & fell over on the port side; we cut away the main and mizeen mast', leaving the foremast standing; she then righted up nearly upright

the sea macking a clean sweep over her, tacking away watter-casks, boats & everything. Two whale-boats, previously launched overboard, where swamped & opsete & brock to pieces. Now we had no boats—ankors, & chaings were also clear'd away & let go overboard to lighten. On finding she did not sink to the bottom, some of the crew run up the fore-riggin' and others standing on the forward house holding on
39 to the foremast, the sea breaking over her fearfully; the stern & cabin under watter, on acc't of the ballast. One cask of watter remained in the lashings, partly mixed with salt watter. We had secured some provition on top of the cabin, beli'ving this to be the savtese place, but as she went down stern foremost we lost it all; we got one piece of pork and a few pieces of raw beaff out of the galley, & part of a bbl. of bread wet by salt; this was carried up in the fore riggin' & lashed fast; in this condition we hung the wreck 20 long days & 20 long nights. Nothing to eat but a small piece of raw beeff or pork twice a day, & les' than a quart of watter, this mixed with salt watter, for 24 hours. We lost all our clothes; I had no coat on, as we were all hard to work & did not think of it untill ther' was too much watter in her, therefor' could not get down below. Here we were exposed to all the rain-storms, hail-storm, N. W. & westerly gal's of wind, cauld
40 & vet all the time & though' meny a time we would frieze to death, and as we did no' see any vessel for so long a time, & our scanty stores, although on as short allowance as possible, starving to death seem'd to us to a certain do'm, if no vessel could come to our assistance soon—the dog was keep' alive, he also being on short allowance, as our last res'urce. On the 30th of Jan'y' we had a tremendoes gale of wind from the N.W., in this gale of wind we lost our rud'er, & the most of the op'er deck, & part of the main deck had brook'away, & cargo begun to come out of the lower hole; she flo'ted on the lumber in the lower; soon as the lumber could get out of lower hole, she would sink with her ballast; the lumber was brook op in small pieces, 2, 3, 4, & 5 feet pieces by her continual'y rolling. As far as could be seen, no cargo in between decks, op'er deck beems brock of,' planks gone, sea washing in, & was a tearable sight to look down upon from aloft. On 2d of January, or between the 1st & 2nd I could not shut my eyes
41 until br'ake of day light, when my strang'ht & nature begun to give away. I called one of the men to keep lookout, they lying on top of the house; although the sea heaving watter on top of them on us, still we would, when natur' give way, shut our eyes for a few minutes. I laid myself down on the house with the rest and fell asleep. As it was growin' daylight the man on the lookout sung out, sail oh! The man said his h'art was so far op in his through' so he could hardly sing out for joy. I jumpt to my feet, & sure enough a Bremen topsail schooner came to our assistance, & it was not until 2 p. m. the schooner suckse'ded in taking us of' & on the 18th of January landed us at Bremerhaven.

Dissmasted in lo'g. 45° 00', lat. 36° 30
Taken of' in lo'g. 33° 30, lat. 37° 30

11 30 1° 00

having drifted 11° 30 to the eastward, and 1° 00 to the northward.

It is hard, but cannot be helpt. I sup'ose there will be a
42. great blessing hipt upon my head amongs' the owners, but I can't help it; one thing, they the can't kill me.

The only thing seems strang' to me, where she sprong a leak, or in other words where the watter came from. There was op'erantly no strain on the vessel, she being light loaded & high out of watter, & could spring

a leack so bad that it was impos'ible to keep her free in spit' of all our hard work for 22 hours; it wor'y me,allmost to death. I had not one pan'y insured—only the not'. I tell you losing this vessell complet'ly ruins me; it took every dollar I had in the world. I had no insurance when she was loaded with marble; of course I did not ap'rahand any danger now, having a light cargo on board & going into fine weather.

Yours resp'tfully,

JOHN ORLANDO.

The envelope enclosing the last above letter was addressed as follows:

Mr. B. F. FOLSOM.
Philadelphia, Pa., U. S. A.

It was postmarked Bremerhaven, 27, 2, '69, and was further postmarked Philadelphia P. O., received Mar. 14, 11 p. m.

The defendant's counsel then admitted that on the 6th day of April, 1869, the plaintiff had duly served on and furnished to the defendant the proper preliminary proofs of loss and interest required by the terms of the said policy to be served on and furnished by him to the said defendant.

The counsel for the plaintiff here rested his cause.

Whereupon the counsel for the said defendant did then and there insist before the judge of the said circuit court, on the behalf of the said defendant, that the said several matters so produced and given in evidence on the part of the said plaintiff, as aforesaid, were insufficient and ought not to be admitted or allowed as decisive evidence to entitle the said plaintiff to a verdict. But to this the counsel for the
44 said plaintiff did then and there object, and insist before the judge of the said circuit court that the same were sufficient and ought to be admitted and allowed to entitle the said plaintiff to a verdict, and the judge of the said circuit court did then and there
45 declare and deliver his opinion, that the said several matters so produced and given in evidence on the part of the said plaintiff were sufficient to entitle the said plaintiff to a verdict. Whereupon the said counsel for the defendant did then and there, on the behalf of the said defendant, except to the aforesaid opinion of the judge of he said circuit court, and insisted that the said several matters were not sufficient to entitle the said plaintiff to a verdict.

The counsel for the said defendant, to maintain and prove the said issue on his part, then offered in evidence the following application, to wit:

46 (Copy.)

VESSEL ON TIME. [14625.

Warranted not to carry petroleum oil or its products under deck, except refined oil in soldered cans in cases.

Insurance is wanted by B. F. Folsom for account of whom it may concern, loss, if any, payable to him, for $3,000, on sch'r B. F. Folsom; vessel valued at $35,000, and to be insured at and from the first day of January, 1869, at noon, until the first day of January, 1870, at noon.

Warranted by the assured not to use any of the Guano Islands.

Warranted by be assured free

If on a passage on the expiration of the term, with liberty to the assured to renew the policy for one, two, or three months, at the same rate of premium, if application be made to the company, on or before the expiration of the first

term. The risk, however, is to terminate at any port at which she may first arrive during the said extended time, on her being moored therein twenty-four hours in good safety; a pro rata premium to be returned for each entire month not entered upon of the extended time, no loss or contribution being claimed. Warranted not to use ports on the continent of Europe north of Hamburg, nor to go east of Navarino in the Mediterranean, during the period insured; nor ports on the continent of Europe north of Antwerp between 1st November and 1st March; nor ports in the British North American Provinces, except between the 15th May and 15th August. Also warranted not to use the West India Islands during the months of August and September. Also warranted not to use ports and places in Texas, except Galveston; nor foreign ports and places in the Gulf of Mexico; nor places on or over Ocracoke Bar; nor any of the West India Salt Islands; nor ports or places on the west coast of America north of Benicia, during the period insured; nor to use Min River nor Torres Straits. Each passage subject to separate average. Warranted not to carry lime under deck. Warranted not to carry grain in bulk, except from the ports of New York, Philadelphia, Baltimore, or San Francisco, and in all cases not to exceed, in tons of 2,240 pounds, one-half the registered capacity under deck tonnage, and the loading to be under the inspection of a surveyor appointed by the board of underwriters for that purpose. The vessel is not to proceed to sea with grain in bags or bulk on board, without a certificate from such inspector that the vessel is properly laden and fitted for her intended voyage. Also warranted not to load in tons of 2,240 pounds more than her registered capacity under deck tonnage, with lead, marble, coal, and or iron, on any one passage. Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade; but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

from loss or expense arising from capture, detention, or the consequences of any attempt thereat.

Except coastwise, U. S.

In case of claim for loss or damage, a deduction of one-third from the cost of repairing or replacing the same shall be made after deducting the value of the old material, except in the case of anchors, and of sheathing of copper or other metal; a deduction of one-fortieth from the expense of repairing or replacing the metal sheathing, or any part thereof (after first deducting the value of the old metal and nails,) shall be made for every month since the vessel was last sheathed until the expiration of forty months, after which time the cost of remetalling or repairing the same shall be wholly borne by the assured. If a technical total loss be claimed similar deductions shall be made from the estimated repairs, and unless the net cost thereof would exceed a moiety of the value of the vessel after making

such deductions the loss shall be deemed partial only. The proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken.

Owner,
Master,
Where and when built,
Tonnage,
Decks,
When coppered,
When opened,
Date of last survey,
Rating,
What will be the premium?—12 $_{0}^{0}$ net.
Binding.

A. W. H., *Vice-President.*
(Signed) WREAKS & WALSH, *Applicant'.*
I. COOPER.

(Written across the face:) Privileged to cancel on the expiration of 6 months, pro rata prem. to be returned for time not used, no loss being claimed.

NEW YORK, *March* 1, 1869.

47 But the counsel for the said plaintiff then and there objected to the introduction of such evidence, on the ground that the application aforesaid is merged in the policy, and the plea in this case is not that the policy was obtained by any fraud or by any misrepresentation.

And thereupon the judge of the said circuit court declared and delivered his opinion, that said application ought not, for the present, to be admitted, and rejected the said evidence as then inadmissible.

(To which opinion and decision of the judge of said circuit court the said counsel for the defendant did then and there except.)

The said counsel for the defendant, further to maintain and prove the said issue on his part, then read in evidence the following telegraphic dispatch, published in the "Herald," "World," "Journal of Commerce," "Commercial Advertiser," and generally in the New York daily
48 papers, and in Philadelphia in the "Philadelphia North American and United States Gazette" on the 22d of February, 1869:

"LIVERPOOL, *February* 21*st*.—The Orlando, from Baltimore for Buenos Ayres, has been lost at sea. Crew saved, and landed at Bremerhaven."

And plaintiff's counsel admits that the plaintiff saw and read that notice on or about the day it was published in Philadelphia, where he resided, before he made the application, coupled with the admission on the part of the defendant that, at the time of the application for the insurance, and at the date of the issuing of the policy, these New York papers were taken at the place of business of the defendant, in the city of New York, and that, during the entire year 1869, as well as prior and subsequent thereto, there was kept in the office of the defendant, in the city of New York, a scrap-book, in which all marine news and disasters reported in the papers were cut out and pasted, and
49 that it was part of the duty of one of the clerks of the defendant to attend to such cutting out of the newspapers of the reports and pasting them in their disaster-book; and that the dispatch alluded was, on the 22d of February, 1869, cut out by such clerk from one of the New York papers, and on that day pasted in their said

scrap-book, together with 17 other marine disasters, and having written over the dispatch in large handwriting by the clerk, "Orlando."

It is further admitted on the part of the plaintiff that, in Lloyd's register, as it is called, there is no schooner by the name of the "Orlando," but there is a bark by the name of the "Orlanda," and that she is marked as a whaler; and that a bark of the name of the "Orlando" had been owned by the then partner of the plaintiff within two or three years.

The defendant then admitted that Lloyd's register, above referred to, contained the name and rating of the schooner "B. F. Folsom," and that, under such name and rating, there appeared in such book
50 the name of "J. Orlando, captain;" and that such Lloyd's register is the book or register which the defendant uses and then used in their office; and that such Lloyd's register for the year 1868, as well as for the year 1869, contained the same references.

Plaintiff's counsel admits that, at the time of the application, Mr. Folsom did not call the company's attention to the publication that had appeared in the papers, and that he made the application himself.

The said counsel for the defendant here renewed his offer to put the aforesaid application in evidence, but the counsel for the said plaintiff then and there renewed his objection to the introduction of the said application.

And thereupon the judge of the said circuit court again declared and delivered his opinion, that said application ought not to be admitted, and rejected the said evidence as inadmissible.

(To which opinion and decision of the judge of said circuit court the said counsel for the defendant did then and there except.)

51 The counsel for the said defendant thereupon rested, and, the evidence being all in, requested the judge of said circuit court to rule as follows:

I. That, if the court find that the plaintiff made application, in person, to the defendant on March 1st, 1869, to effect the insurance on the schooner B. F. Folsom, and at that time knew that John Orlando had sailed in said schooner as her master, and that the vessel had sailed from Boston for Montevideo and Buenos Ayres on the 6th of January, 1869—

And if the court further find that said vessel was disabled at sea on the 13th of January, and was totally lost through the perils of the sea, and that her crew and captain were taken off by a Bremen vessel bound to Bremen, and were landed at Bremerhaven on the 18th of February, 1869, and the master sent a letter on the 20th February, 1869, announcing said loss
52 to the plaintiff, and also noted his protest on the 18th February, 1869, before the American consular agent; that, on the 22d day of February, 1869, there was published in the daily public newspapers, in the city of New York and in the city of Philadelphia, a telegraphic dispatch in these words: "LIVERPOOL, *Feb.* 21.—Orlando, from Balt. for Buenos Ayres, lost at sea. Crew saved, and landed at Bremerhaven;" and that this dispatch, as so published in Philadelphia, was seen by the plaintiff before he applied to the defendant to effect the insurance, and that the plaintiff did not call the attention of the defendant to its publication; and that there was no schooner called the "Orlando" on the shipping list of the defendant, but there was a bark of that name, a whaler; and that the policy is a printed form with blank spaces for the particulars of the risk, and is for the sum of $3,000 from January 1, 1869, to January 1, 1870, and does not state who the master of the
53 vessel was, or what voyage she was upon, and valued the vessel at $35,000:

First. That, as the plaintiff has given no evidence that he communicated to the defendant the name of the master and the voyage, there is, on the evidence, a legal presumption that the name of the master and the voyage were not communicated to the defendant.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Second. That the burden of proof is upon the plaintiff, to give direct positive evidence that such facts were communicated.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Third. That the burden of proof is not upon the defendant to give
54 direct negative evidence to establish that such two facts were not communicated.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Fourth. That the omission of the name of the master and the voyage in the policy—there being a printed form with blank spaces for those particulars—is presumptive evidence that those particulars were not communicated to defendant.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Fifth. That the knowledge of the plaintiff of the dispatch concerning the Orlando was a material fact within his knowledge to be communicated to said defendant.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

55 Sixth. That the plaintiff must be presumed to have had knowledge on the 1st of March of the actual loss of the schooner before that day, as it is shown that such information, by telegraph, could have reached the plaintiff as early as the 22d day of February, and that the plaintiff has not rebutted such presumption.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Seventh. That the burden of proof is upon the plaintiff to give direct positive evidence that the loss of the vessel was unknown to him when he effected the insurance.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Eighth. That the omission of the plaintiff to call the attention of the defendant to the notice of the loss of the Orlando, published in
56 the newspapers, was the concealment of a material fact, and avoided the policy.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Ninth. That it was the duty of the master to communicate the intelligence of the loss to the plaintiff by the earliest and speediest usual mode of communicating.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Tenth. That the failure of the master to communicate the loss to the plaintiff by telegraph avoids the policy.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

II. And that, if the court further find, in addition to the above,
57 that the notice of the loss of the Orlando was seen by the defendant, and was cut out of the newspaper and pasted in their

disaster-book, with 17 other items of disaster, on the 22d of February, then, as matter of law—

First. That the defendant is not presumed to have had knowledge of the name of the master or the voyage the schooner was upon.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Second. That the knowledge of the defendant of the dispatch concerning the Orlando was not such a knowledge as to bring it within the rule that facts already known need not be communicated.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

58 III. And, if the court further find, in addition to the above, that the policy does not contain the words "lost or not lost," then, as matter of *of* law—

First. That the vessel being totally lost at the time of the insurance, on the 1st of March, 1869, there was no subject-matter upon which the policy could take effect.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Second. That, the policy being made March 1st, to cover the vessel from January 1st, 1869, there was an implied warranty that she was in existence on the 1st of March.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Third. That the above construction is consistent with the con-
59 struction given to other contracts respecting property which has ceased to exist.

But the judge of said circuit court refused so to rule; to which refusal the counsel for the defendant did then and there except.

Both parties here rested, and the foregoing bill of exceptions contains all the evidence given by the witness herein, and all the admissions of the parties given upon the trial hereof.

And the said counsel for the defendant, after the putting in of the evidence was completed, and before the conclusion of the trial, further insisted that the matters so proved and given in evidence, on the part of the said defendant as hereinbefore set forth, taken in connection with the matters proved and given in evidence on the part of the plaintiff, as hereinbefore set forth, were sufficient and ought to be admitted and allowed as decisive evidence to entitle the said de-
60 fendant to a decision in their favor, and to bar the said plaintiff of his action aforesaid, and did then and there pray the said court to admit and allow the said matters so proved and given in evidence, in connection as aforesaid, to be conclusive evidence in favor of the said defendant, to entitle them to a decision in their favor, and to bar the said plaintiff of his action aforesaid; but the said court decided that the matters so proved and given in evidence, on the part of the said defendant, taken in connection with the matters so proved and given in evidence, on the part of the said plaintiff, were not sufficient to bar the said plaintiff of his action aforesaid, and refused to make and render its decision in favor of the said defendant, but found in favor of the plaintiff, upon the evidence, for the sum of $3,348.20; to which decision the said counsel for the defendant then and there duly excepted.

61 And thereupon the said counsel for the defendant requested the court to make the following special findings of fact herein to the end that the same might be reviewed:

First. That the defendant made, and delivered to the plaintiff, on the

1st day of March, 1869, its policy of insurance on the schooner B. F. Folsom, for the sum of $3,000, from Jan. 1, 1869, to Jan. 1, 1870. The policy valued the vessel at $35,000. It did not state who the master of the vessel was, or what voyage she was upon. The rate of premium was expressed to be twelve per cent. net. The policy contained this written clause: "Privileged to cancel at the expiration of six months; pro rata premium to be returned for time not used; no loss being claimed." The words "lost or not lost" were not contained in the policy.

Second. That the vessel had sailed from Boston for Montevideo
62 and Buenos Ayres, on the 6th of January, 1869, with John Orlando as her master, and a part owner.

Third. That the vessel was a three-masted schooner. She was disabled at sea on the 13th of January, losing two of her masts, and her entire hull, except a part of her bow, going under water. Her crew remained on her for twenty days and twenty nights, the vessel being kept from sinking by the buoyancy of some lumber which formed part of her cargo. The schooner was totally lost through the perils of the sea.

Fourth. That her crew were taken off from her by a Bremen vessel, bound to Bremen, and were landed at Bremerhaven the 18th of February, 1869.

Fifth. That, on the 20th of February, John Orlando, the master of the schooner, wrote and mailed, at Bremerhaven, a letter to the
63 plaintiff, who was one of the owners of the schooner, at Philadelphia, announcing the loss of the schooner. This letter reached the plaintiff in due course of mail, after March 9, bearing, when it reached him, a Bremerhaven postmark of Feb. 20, and a New York post-mark of March 9. The master wrote a second letter from Bremerhaven to the plaintiff, at Philadelphia, on the 26th of February, giving fuller particulars of the loss. This letter reached the plaintiff in due course of mail, after March 14, bearing, when it reached him, a Bremerhaven postmark of Feb. 27, a New York postmark of March 14, and a Philadelphia postmark of March 14.

Sixth. That the master had no money with which to prepay *for* his passage to the United States, or for a telegraphic dispatch to his owners, and was a stranger in Bremerhaven. His owners had no friends or credit there. Prepayment of a telegraphic dispatch to the United States was required. He did not communicate with the
64 plaintiff, or with any of the owners of the schooner, by telegraph.

Seventh. That the master obtained a passage from Bremerhaven to the United States on an American steamer by giving an order on the plaintiff for the passage-money.

Eighth. That he noted his protest against the loss of the schooner, before the United States consular agent at Bremerhaven, on the 18th of February; informed that officer of the loss of the vessel, and of the arrival of the crew, and applied to him for assistance. He and his crew were furnished with a boarding-place by the consular agent.

Ninth. That, on the 22d of February, there was published in the daily public newspapers in the city of New York, and in the city of Philadelphia, the defendant being located in New York, and the plaintiff residing in Philadelpha, a telegraphic dispatch in these
65 words: "Liverpool, Feb. 21. Orlando, from Baltimore for Buenos Ayres, lost at sea. Crew saved and landed at Bremerhaven."

Tenth. That this dispatch, as so published in Philadelphia, was seen by the plaintiff before he applied to the defendant to effect the insurance in question.

Eleventh. That the plaintiff made application, in person, to the de-

fendant to effect the insurance in question, and did not call their attention to the dispatch or to its publication. At the time he so made application he knew that John Orlando had sailed in the schooner as her master, and also from what port and on what voyage she had sailed.

Twelfth. That the dispatch, as published in New York, was cut out from one of the newspapers by a clerk in the employ of the de-
66 fendant, at their office in New York, and pasted, on the 22d of February, in a scrap-book, with seventeen other items of marine disasters, which were pasted therein on the same day, such scrap-book being regularly kept by such clerk as a record of disasters. Over the dispatch in question in the book was written, in large letters, the word "Orlando."

Thirteenth. That in the shipping-register used by the defendant at the time of issuing the policy, the existence of a bark called the "Orlando," a whaler, was noted, but no schooner Orlando was noted.

Fourteenth. That such bark had, in fact, been owned within two or three years before the date of the policy, by a person who was the partner of the plaintiff, but the plaintiff did not, at the time the policy was issued, know in what trade such bark was.

67 Fifteenth. That such shipping-register contained the name of the schooner "B. F. Folsom," and her rating, and the name of J. Orlando as her master, and was published in March, 1868.

Sixteenth. That the proper proofs of loss and of interest were duly furnished by the plaintiff.

68 But the judge of said circuit court refused to make any special findings of fact herein, to which refusal the counsel for the defendant did then and there except.

69 And inasmuch as the said several matters so produced and given in evidence, on the part of the defendant as aforesaid, as well as the said matters so produced and given in evidence on the part of the plaintiff as aforesaid, and the said matters so appearing upon the trial as aforesaid, and the said prayers and requests so made as aforesaid, by the said counsel for the defendant, and the exceptions made and taken to the several rulings, decisions, and opinions of the said court, as hereinbefore mentioned and set forth, do not, nor do any, nor does either of them appear upon the record of the said trial, or by the finding or decision of the said court herein; therefore, on the prayer of the said defendants, by their counsel, the said circuit judge hath to this bill of exceptions put his seal, according to the statute in such case made and provided, this third day of January, in the year 1871.

(Signed) SAMUEL BLATCHFORD. [L. S.]

70 (Endorsed:) U. S. circuit court. B. F. Folsom vs. The Mercantile Mutual Insurance Company. Bill of exceptions. Scudder & Carter, def't's att'ys. Filed Nov. 27, 1871.

71 Supreme Court of the United States.

THE MERCANTILE MUTUAL INSURANCE COMpany, plaintiff in error,
vs.
BENJAMIN F. FOLSOM, DEFENDANT IN ERROR.

Of December term, in the year of our Lord one thousand eight hundred and seventy-one.

Afterwards, to wit, on the third Monday of December, in this same term, before the justices of the S[illegible]

E. Wells Sackett & Bro., Law Printers, cor. Pine and William Sts.

Supreme Court

OF THE UNITED STATES.

THE MERCANTILE MUTUAL INSURANCE COMPANY,
Plaintiff in Error,

vs.

BENJAMIN F. FOLSOM,
Defendant in Error.

STATEMENT.

Five distinct questions arise on the record, and are presented for the consideration of the Court. They are

I. Does a marine policy of insurance for one year from January 1, 1869, made, dated and delivered March 1, 1869, cover a *total* loss of the vessel insured, occurring on the 13th of January, 1869, where the language of the policy is as follows: "Do make insurance and cause to be insured, at and from the first day of January,, 1869, at noon, until the first day of January, 1870, at noon" (Record, p. 3), which policy does not contain the words "lost or not lost."

II. Is it the duty of the captain and part owner of a vessel to communicate by telegraph (that being a usual mode of communication) to the other owners the loss of the vessel, and does the omission to do so render void a policy of insurance issued after such loss might by that means have been communicated?

III. May concealment be proved as a defense under the plea of *non-assumpsit*, in an action on the policy?

IV. Upon whom does the burden of proof lie to show the *communication* to the insurance company of certain facts, material to that risk, and shown to be within the knowledge of the insured; that is, is there any *presumption* in contracts of insurance in favor of the insured that he has communicated to the insurer all the material facts, or that he is ignorant of a material fact which it is shown might have been known to him?

V. Is it error for a judge, who tries a cause without a jury, under the stipulations of the parties waiving a jury, to refuse to make special findings of fact, under the act of Congress of March 3, 1863 (13 Stat. at L., p. 500)?

The record presents the foregoing questions for review, and also exceptions to the ruling of the Court on the admission of evidence (pages 16 and 19); and refusal to receive evidence (page 18); and refusing a non-suit (page 16); and refusals to rule as requested (page 19, *et seq.*); and refusal to make any special findings (page 23).

I will consider the foregoing questions in the order above presented.

POINTS.

First Point. It is a principle of the law of marine insurance that the insurer may assume the risk of a previous unknown injury, by express agreement.

In a *voyage* policy this is effected by making the policy relate back to the inception of the voyage—usually by the use of the words "at and from" a port named.

In a *time* policy this is done by making the risk attach from a given antecedent date.

In either case, *some* antecedent risks are assumed by the insurer.

Is the risk of a prior TOTAL LOSS *and extinction of the subject insured included?*

The question is undecided by any adjudged case, and a reference to the general principles of the law of contracts will have to determine it.

When a chattel has been *destroyed* it has ceased to be the subject of *ownership*—it cannot be bought nor sold—and every contract in reference to it, based on the implied understanding and agreement that it is in existence, is void.

Allen *vs.* Hammond, 11 Peters, 63.
Hastie *vs.* Couturier, 9 Ex., 102.
Strickland *vs.* Turner, 7 Ex., 208.
Benjamin on Sales, 57.
Duncan *vs.* Great Western Ins. Co., 3 Keyes, 396.

If, however, it be merely *damaged*, the loss falls on the owner. If a cargo be sold at sea, the purchaser takes the risk of its *condition*, and any damage occuring before the sale is the purchaser's loss.

So, where a ship at sea was sold, and prior to the sale she had been carried so high on land as to be useless for navigation, but remained a ship, the loss fell on the buyer.

Barr *vs.* Gibson, 3 M. & W., 390.

The principle of law deducible, is this: The implied warranty of *existence* being satisfied, the parties contract with reference to the then condition of the subject—the purchaser acquires the ownership of the subject in the condition it then is—and, therefore, takes it subject to all prior contingencies, such as a general average loss, a salvage claim or other injuries, direct or consequential, which may damage the property itself or create a lien on it.

The purchaser, by taking the title without exception of such risks, takes the burden of them. In other words, he becomes his own insurer of all past risks not amounting to a total loss.

The contract of indemnity, or *insurance*, is based on the same implied warranty that there is property in existence to insure—a person in existence having an *interest* or title to the property. In other words, there can be no idea of a contract without parties and a subject.

When, therefore, insurance is effected *to-day* on a vessel at sea, which sailed a month ago, bound from A to B, but the risk is to commence from her departure from A, the insurer assumes no greater risks than the *purchaser* of the vessel would.

Making the policy cover the past month in terms, by fixing the date instead of the place of departure, will not alter the effect of the contract, or make the risk greater.

But it is permitted to the parties to *expressly* agree to insure against a prior *total* loss or extinction of the subject.

This, in a policy of marine insurance, is done by the use of the words:

"LOST OR NOT LOST."

"In Commercial Law: A clause introduced "into marine policies of insurance (and said to "be peculiar to the English policies), to show "that the contract is intended to embrace losses "which may have happened before the policy "is subscribed."

Burrill's Law Dict., *sub verba.*

"These words are *sometimes* inserted in "policies of marine insurance. They are used "when the underwriter undertakes that if "the ship or goods should be lost at the time of "the insurance, still the underwriter is liable, "provided there is no fraud."

Bouvier's Law Dict., Vol. 2, p. 85, *sub verba.*

"In addition to the various risks above enum-"erated, which the underwriters take upon "themselves, it is frequently the practice to in-"sure her *lost or not lost*, which is certainly "very hazardous, because if the ship should be "lost at the time of the insurance, still the "underwriter, provided there be no fraud, is "liable. The premium is, however, great in "proportion, depending upon the circumstances "stated to show the probability or improbability "of the ship's safety.

Park on Ins., p. 25, 3d ed., 1792, citing Harford *vs.* Maynard, before Lord Mansfield, Guildhall, Hil. Vac., 1785, Molloy, b. 2, ch. 7, § 5.

This is the precise language used in Ruggles *vs.* Gen. Int. Ins. Co. (12 Wheat, 418.)

"The law permits, and the interest of com-
"merce require, insurances to be made by a
"sort of retrospect, after the risk has been
"partly, or even wholly, run, and this may be
"done as long as the fate of the adventure
"remains unknown. This gave occasion to the
"introduction of the words '*lost or not lost*' into
"our policies.

Marshall on Marine Ins., p. 191, 5 ed.

"In all our policies are inserted the words
"'*lost or not lost*,' by which the insurer takes
"upon himself not only the risk of future
"losses, but also by a sort of retrospect, the
"loss, if any, which may already have hap-
"pened.

"It is said that this clause is peculiar to Eng-
"lish policies, but the same thing is expressed
"in the French policy by the words '*sur bonnes*
"'*ou mauvaises nouvelles*.'

"This clause, it is probable, was originally
"inserted in policies where there was reason to
"fear that a loss had already happened, and in
"such cases the insertion of it necessarily in-
"duced the payment of a higher premium.
"But it has long been inserted in every policy
"as a matter of course. * * * Natural law
"would require that the subject-matter of an
"insurance, like that of a sale, should exist at
"the time of the contract, but the municipal
"law adds that although the thing insured may
"possibly no longer exist, but may have
"perished before the contract was made, yet
"unless the assured, or his agents, knew this
"at the time of making the contract, the thing
"insured is, by a sort of fiction of law, founded
"on the good faith of the insured, supposed
"still to exist, so as to be a proper subject of

"insurance, and not to be considered as lost till "intelligence of the loss arrives. Or may not "the insurance in such case be presumed to be "made, as it were, *nunc pro tunc?* May it "not be presumed to have had its existence "while the subject-matter of it was in being, "and before the time when the risk commenced? "Upon this ground, and from the necessity of "the case, policies WITH THIS CLAUSE are "deemed legal contracts, and not wagers."

Marshall on Marine Ins., p. 267, 5 ed.

"A time policy, like a voyage policy, may be "effected retrospectively *if it contain* the clause "'lost or not lost.'"

1 Arnold on Ins., 2 Am. ed., 416.

"When the words 'lost or not lost'—Gallicé "*sur bonnes et mauvaises nouvelles*—are in- "serted, they render the underwriters liable in "respect of loss by any of the above perils, "though the ship be lost at the time of insur- "ance, a circumstance which *but for those* "*words* would avoid the policy."

Smith, Merc. Law, p. 433.

"Lost or not lost."—These words "lost or not lost," which follow the word "insured" in the policy, are words of the greatest importance in this contract, and they are peculiar to English policies, and are not inserted in the policies of foreign countries. They are certainly very hazardous for the underwriters, for their meaning or purport are "that if the ship or goods should be lost at the time of the insurance, still the underwriter, provided there is no fraud, is liable."

Hillyard on Marine Ins., p. 10.

"There is no doubt that a time policy may

"be as retrospective as a voyage policy, *if it* "*contain the clause* '*lost or not lost*,' and this "equally in reference to the cargo as to the "ship."

Parsons on Marine Ins., vol. 1, p. 307.

"The insurer can, if such be the intention and "agreement, make themselves responsible for a "loss which has already happened when the "policy is made, and even if that loss be total, "so that the subject-matter of the insurance is "then non-existent. This is usually done by "the words 'lost or not lost,' which are intro-"duced into most policies; but any language "indicating the same purpose would have the "same effect."

Id., vol. 2, p. 44.

The cases found in the books where these words have been the subject of judicial investigation are those where they have been in the policy.

In Sutherland *vs.* Pratt, 11 M. & W., 296, the plaintiff did not acquire an interest in a cargo of goods until *after* a GENERAL AVERAGE loss. The policy was "lost or not lost." Held by the Court: "Such a contract operated in the "same way as if the plaintiff having purchased "goods at sea, the defendant, for a premium, "had agreed that if the goods *at the time of the* "*purchase* had sustained any damage by perils "of the sea, he would make it good."

See remarks in 2 Duer, on Ins., p. 5.

In Hastie *vs.* Couturier, 9 Ex., 109, Coleridge, J., in remarking on above case, says: "If "the goods had been *totally lost* before the con-"tract of purchase was made, there would not "be an insurable interest, as a person cannot "*buy* a thing that is totally lost."

Neither can one *sell* or *own* what has no existence.

The policy in suit did not contain these words or any equivalent, and the denial of the motion for a nonsuit (Record pp. 16, 20) and the refusal to rule were error.

Second Point.—ELEMENTARY PRINCIPLES.

(*a.*) An insurer is bound to communicate all intelligence of his vessel to the underwriter at the time of effecting insurance.

3 Kent Com., 282.

(*b.*) The fact that the insurer employs an *agent* to effect the insurance does not change the rule. In the language of Chancellor Kent: "If the party, after having given instruc-"tions for effecting a policy, receives intel-"ligence material to the risk, he must *forth-*"*with, or with due and reasonable dili-*"*gence*, communicate it or countermand his "instructions."

2 Com., 286.
Watson *vs.* Delafield, 2 Caines 224.
" " 1 John 152.
" " 2 John 526.
McLanahan *vs.* Universal Ins. Co., 1 Peters 170.
1 Parsons on Marine Ins., 438, 470.
Green *vs.* Merc. Ins. Co., 10 Pick. 402.

Arnould states the proposition thus:

"If an agent, in ignorance of a loss that has happened, effect an insurance for his principal, who knew of the loss at the time the policy was effected, *but not in time to countermand it*, the policy will not be

avoided by the concealment; if on the other hand the principal, knowing of the loss, effected the insurance through an agent who was ignorant of it, the non-communication of the fact of loss will, of course, vitiate the policy.

1 Arnould Ins., 542 (2 Am. ed.); 521, 3 Eng. ed., 1866.

"If, after orders given to insure, material facts are brought to the knowledge of the insured, he ought to use the utmost degree of reasonable diligence in communicating them to the underwriter, so as to reach before the policy is actually effected. And if the countermand is not in time, owing to the fraud, negligence, or mistake of the agent, the agent's fault will be that of the principal."

1 Arnould 537, 3 Eng. ed.

(*c.*) It has usually happened that the concealment of the loss has been the act of the *agent*, and the question then presented has been, whether the insured owner, who has effected his insurance innocently, so far as *actual* knowledge is attributable to him, shall be *presumed* to have known, or shall be affected with the knowledge of his agent.

The solution of this question has been different in different Courts.

In Fitzherbert *vs.* Malther, 1 T. R., 12, and Gladstone *vs.* King, 1 M. & S., 35, the concealment of the master was held to discharge the insurer.

See also Stewart *vs.* Dunlop, 4 Brown P. C., 483, cited in 1 Parsons on Mar. Ins., p. 454, n. 4.

In Gen. Int. Insur. Co. *vs.* Ruggles, 12 Wheaton, 408, the Court came to the conclusion that the master, after the loss of his vessel, ceased to be the agent of the in-

sured, and put their decision on that ground.

This case has been so severely criticised, and its reasoning shown to be so vicious, that it can hardly be deemed an authority.

See Duer on Ins., vol. 2, 415, *et seq.*
1 Phillips on Ins., § 549.
1 Parson on Marine Ins., 458,
2 Parson on Maritime Law, 162.
Proudfoot *vs.* Montefiore, English Law R.. 2 Q. B., 511.

The rule in New York is the same as the English, viz., that the concealment avoids the policy.

Watson *vs.* Delafield, 2 John, 526.

(*d.*) The reason of this rule is founded in the entire good faith required in this contract.

The insurer has a right to believe that the insured *has* all the information which he ought to have, and for this reason the knowledge of the agent affects his principal, for otherwise it would be offering a premium to conceal a loss until an insurance could be effected.

The argument is:

1. The principal effecting insurance is ignorant of a loss and acts innocently.
2. The agent knows of and refrains from letting his principal know of the loss.
3. The insurance company has a right to believe the principal knew all he ought to know, and that he has communicated all he knew.
4. Whether he knows and conceals, or does not know but ought to have known, the result is the same, the policy is avoided.

In Andrews *vs.* Marine Ins. Co., 9 John, 34, there is a distinction drawn as to the character of the diligence to be used.

The Court say: "It does not appear "that Capt. Clark had directed insu- "rance, or was apprized of any inten- "tion of the plaintiffs to cause insu- "rance to be made. As we cannot, "therefore, perceive any interested "motive in him to withhold the intel- "ligence, *the* CASE *does not seem to re-* "*quire that extreme diligence that would* "*have been due had he known that appli-* "*cation for insurance was pending.* "We ought, then, to exact from him, "as part owner, that ordinary dili- "gence only which the nature of such "mercantile concerns and common "prudence and discretion would de- "mand."

See Judge Duer's comment on this case, in 2 Duer on Ins, Note 4, p. 530.

(*f.*) It is said the rule of morality requires that the insured should use the same diligence to prevent the insurance as he would to prevent the payment of the premium if the vessel were safe.

2 Duer on Ins., secs. 13 and 19, p. 410; and note 4, p. 534.

1. The *expense* of communication cannot be made the criterion of its necessity—for what proportion shall the courts fix as the rule, and what figures shall they take as the extremes? Shall poverty be an excuse; and if so what degree?

The only safe rule is, that the insured shall use the established means of com-

munication without regard to the expense or the condition of the individual.

(*g.*) The case of Proudfoot *vs.* Montefiore, Court of Q. B. (T. T., 1867), 2, 510, is relied on by the defendant as an argument that the omission to telegraph was a concealment which avoids the policy.

The facts in that case were these:

The plaintiff was consignee of a cargo laden at Smyrna, which sailed for Liverpool, and the plaintiff was advised by *letter* of her departure. A loss occurred after the letter of advice was sent, which was known to the plaintiff's agent in Smyrna, and he wrote and mailed his letter at once, and in it suggested the doubt as to telegraphing. Insurance was effected in ignorance of the loss.

The Court held the agent's duty was to telegraph, and that the policy was void.

Third Point.—The pleadings in this case presented but one issue. Did the Insurance Company insure the plaintiff below? And in the development of that issue the plaintiff made what he deemed sufficient proof, when he proved the taking of the policy, the loss of the vessel and the performance of the conditions of the contract.

The defendant then offered and re-offered pertinent and sufficient proof to establish that the policy was void, by reason of the concealment of certain facts in the possession of the plaintiff at the time it was issued.

The objection was taken that this evidence

could not be given under the issues raised by a plea of *non-assumpsit*, and so the Court ruled (Record pp. 18 and 19).

This was error. "The defendant under the "general plea of *non-assumpsit*, may prove "anything that will have the effect of rendering "the policy void—such as a *concealment* or "misrepresentation of circumstances, by which "the underwriter may have been deceived or "misled as to the nature of the risk.

3 Phillips' Ev., p. 268., 4 Am. Ed., Cowen & Hill's notes.
2 Greenleaf's Ev., § 135.
Still *vs.* Rood, 15 John, 230.

The case of Elkin *vs.* Jansen, 13 M & W., 660, is opposed to this view, but it is no authority, since it is expressly stated to have arisen under a new system of pleading.

Per Counsel Arg.—[Alderson, B. The assured is bound to put the underwriter in the same situation with respect to knowledge, as he is himself.] If that be so, then the issue is on the insured to prove that he communicated the fact. This matter has not received a solemn adjudication, *because* questions on this subject formerly arose under the general issue.

In Arnould Marine Ins., vol. 1, Perkins' 2d Am., edition, p. 578, it is said: "*Since the new* "*rules of pleading*, the defense of misrepre- "sentation and concealment must be specially "pleaded."

And see note in 2 Duer on Ins., p. 685.
Brown's Leg. Maxims, p. 723.
Park on Marine Ins., 8 ed, p. 806.

Fourth Point.—The defendant below, (the Ins. Co.) showed—

1. That the plaintiff knew that the schooner

"B. F. Folsom" was on a voyage from Boston to Montevideo and Buenos Ayres, (pp. 9, 12).

2. That the plaintiff knew that she had as captain one John Orlando.

3. That prior to applying for this insurance which he did *in person*, he had seen in the Philadelphia newspapers a telegraphic dispatch as follows:

"Liverpool, Feb. 21.—The 'Orlando' from "Baltimore for Buenos Ayres has been lost at "sea. Crew saved and landed at Bremenhaven." Which he did *not* communicate to the defendant (pp. 18, 19).

Defendant then offered the *application* or slip in evidence, and the Court excluded it. This we have shown was error (*vide* Third Point).

That the facts thus shown were *material* to the risk may be *inferred* from the nature of the facts.

Tidmarsh *vs.* Washington Ins. Co., 4 Mason, 439, 441.

Fiske *vs.* New England Ins. Co., 15 Pick., 310, 316.

2 Phillips on Ins., 504.

A. It did not need the evidence of any *expert* (even if such evidence were admissible) to inform the Court that the estimate which the insurer would put on the risk it ran would be higher, and the premium consequently higher, for an insurance on a vessel, a *suspicion* of whose loss was raised, or that these facts did raise such a suspicion.

B. It being conceded, then, that *these were material facts* within the knowledge of the insured, the question is, is there any *presumption* that the insured did or did not communicate them to the insurer; and, as a

necessary result, upon whom rested the burden of proof.

2 Duer on Insurance, 68.

C. *Presumptions* in law arise out of the inference that what ordinarily is found to exist or happen will continue to exist or happen. And it is said that fraud and dishonesty are not to be presumed, and that "*concealment* "being nearly allied to the charge of fraud, "the burden of proof is upon the under- "writers to establish both the *existence of* "*the fact concealed* and its *materiality* to "the risk."

2 Greenleaf's Ev., § 398.

If, therefore, the fact is shown to exist and to be material to the risk, does the presumption arise that it has been concealed.

Bearing in mind that the contract of insurance is based on the most perfect openness and fairness of dealing, that ABOUNDING GOOD FAITH, *uberrima fides*, is essential to its existence, what is the presumption of law in reference to other relationships where the same rules of conduct apply?

(*a.*) Attorney and client are allowed to deal with each other; but whenever the dealing comes in question in Court, the burden lies upon the attorney to show the fairness of his bargains, even before any suspicion of unfairness is created.

The same rule is applied to guardian and ward, to principal and agent, and to all those relationships where *confidence* is reposed in the parties.

3 Greenleaf's Ev., § 253.
1 Story's Eq. Jur., §§ 311—314.
Nesbitt *vs.* Lockman, 34 N. Y., 167, and cases cited.

(*b.*) If *confidence* is said to create an exception to the general rule, it can only be because the law, when a contract arising out of this relationship is before the Court, does not assume that fair dealing in this relationship is the rule, but rather the exception, and hence requires it to be shown before the contract can be enforced.

Comstock *vs.* Comstock Exec., 57 Barb. 453.

(*c.*) The ordinary presumptions are, that what it is against a party's interest to do, that he will not do, and many legal rules are based upon it and the converse presumption, that what will benefit a party he is presumed to do.

1. The law of evidence prohibiting parties in interest to testify has this idea at its foundation.

   1 Phillips' Ev., Cowen and Hill's Notes, Edwards' 4th Am. ed., p. 25.

2. Declarations against interest are received and credited for the same reason.

   1 Phillips, same ed., pp. 301—303

3. A deed to an infant grantee of too tender an age to be capable of discretion, will be presumsd to be accepted if beneficial.

   Spencer *vs.* Carr, 45 N. Y., 410.

(*d.*) The application which was offered and excluded contains the particulars of what the plaintiff conveyed to the defendant. (p. 17.)

D. The necessary result of this reasoning is, that the plaintiff did not communicate to the defendant the two facts: 1. What voyage the vessel was on. 2. Who commanded her. It is admitted that the plaintiff did not mention the newspaper item.

E. The effort is made to avoid the effect of this as a concealment, because the insurance company had pasted in their "Disaster Book" the slip from the newspaper, marking over it the word "Orlando," on February 22, and had in their Lloyd's Register, published in March, 1868, under the name of the Schooner B. F. Folsom, the words: "J. Orlando, Captain," and the rule that what is already known need not be communicated, is invoked.

1. The rule in question does not apply.

The insurance was applied for on March 1st, eight days after the item was pasted in the book, and the extracting it in that way lends no greater force to it than did the mere taking the paper at the office of the company.

1 Arnould M. Ins., 534 (4 Eng. Ed.).
Nicholson *vs.* Power, 20 L. T, N. S., 580.
Dickenson *vs.* Com. Ins. Co., Anthon, N.P., 92; 2 Duer, 486.

The rule adverted to is not that *every particular thing* which the underwriter has seen or known need not be communicated, but only that facts of general importance and interest which may effect all alike need not be told.

In Bates *vs.* Hewitt (2 B. & S. R.) case of the Confederate steamer Georgia, Cockburn, J., uses this language:

"It would be most dangerous to introduce the doctrine, that the assured, "when negotiating for an assurance may "speculate, whether the particulars will "bring to the mind of the assurer the material fact, which it is necessary he should "know, in order to estimate the amount of "the risk that he undertakes, and which

"in consequence it is the duty of the as-
"sured to communicate."

2. Seeing the entry in the Disaster Book, in connection with the entry of the master's name in the Register would not have suggested to the insurance company any suspicion that they referred to the schooner B. F. Folsom.

(*a.*) Because there was a vessel called the *Orlando*, a bark.

(*b.*) Because there was no presumption from the entry of the captain's name in the Lloyd's, of his continuance in command of that vessel.

(*c.*) The plaintiff possessed the key by which to read this dispatch aright, and kept it to himself. He does not and cannot claim that it did not excite his fears for the safety of his ship, and yet he lies by and speculates on the chance of the insurer not having seen the notice—at that time he did not and could not know they had it in their disaster book—and two months after the vessel sailed (she sailed January 6, 1869—Record, p. 9,) on a voyage of the average duration of 60 days, (Record, p. 12,) and within a week after seeing the notice, the plaintiff applies for and obtains an insurance dating back to January 1. He knew that he possessed information which the company did not. and applying that information to the other facts, enabled him to form a just estimate of the risk he was offering, and deprived the company of estimating it on equal terms.

Leigh *vs.* Adams, 25 L. T., N. S., 2B,, p. 569.
Da Costa *vs.* Scandaret, 2 P., Will., p. 70.

Fifth Point.—The Court refused to make any special finding of facts, and defendant excepted.

A. The Act of Congress of March 3, 1863, (13 St. & L., § 500) conferred its sanction on a practice which had long prevailed, and from the decisions it will be seen that whenever a jury was waived, the Supreme Court would not review anything, unless the *facts* were in some form explicitly placed on the record.

Guild *vs.* Frontin, 18 How, 135.
Prentise et al. *vs.* Zane's Adm., 8 How, 470.
Hyde & Gleises *vs.* Booraem Co., 16 Peters, 169, 176.
Taylor et al. *vs.* Savage's Exec., 2 How, 394.
United States *vs.* King, 7 How, 833.

B. It is apparent on the face of the act that Congress did not pass it to deprive the suitor of the *right of review*. The construction put on it by the Court below leaves it to the discretion of the Judge below whether the suitor shall be allowed the *benefit*, and this Court the *power*, of review.

Clement *vs.* Phœnix Ins. Co., 7 Blatch. C. C., 53.

C. This leads to the consideration of the question *for whose benefit* the act was passed, and whether it shall operate as a TRAP or be construed in aid of justice?

1. The right of review in the Appellate Court of all decisions upon *matters of law* is given in the broadest terms by the original act (Act 1789, § 21), and the method of review prescribed by that act, as expounded by the decisions is by writ of error to remove the RECORD into this Court. But this writ brings nothing into the Supreme Court but the record, and the plaintiff in

error can allege in this Court, as ground for reversing the judgment, an *error of law only*, and only such questions of law as clearly appear by the record to have been raised in the Court below, and decided against him.

2. When the trial is by the Court the necessity of a special finding is well illustrated by the case of a suit against an indorser whose defense is denial of presentment, on which there is conflicting evidence, but the judge, in making his decision, holds that there was no presentment, but that it was excused.

   The defendant is advised that the opinion was erroneous, and seeks to review it on writ of error. He asks for a special finding that there was no presentment and is met by a refusal to make any special finding, but the Judge allows a bill of exceptions in which this request and refusal is set forth, together with all the evidence on the question of presentment.

   If the Appellate Court decides the excuse for non-presentment insufficient, will they examine this evidence, or will they say the Court has found a general verdict against you which covers the question of presentment.

3. The act granting to the appellant the benefit of a review of the facts when a special finding is made, and empowering the Court to make it, conferred a *new jurisdiction* on this Court, clearly for the benefit of the suitor, and by use of the word "may," left the suitor to elect whether he would avail himself of it or not.

Generes *vs.* Campbell, 11 Wall, 193.
Minor *vs.* Mechanics Bank, 1 Peters, 63.
Supervisors *vs.* U. S., 4 Wall., 435.

Sixth Point.—A non-suit was asked for (Record p. 16), and if the view heretofore urged that the policy did not cover a prior total loss is correct, should have been granted; and, inasmuch as the refusal to grant it if held error in this Court will entitle the plaintiff in error to an absolute reversal of the judgment, the following views, though in opposition to the prevailing opinions in Elmore *vs.* Grymes, 1 Peters, 469; De Wolf *vs.* Rabaud, 1 Peters 476, are presented. The dissenting opinion of Mr. Justice Johnson (p. 47), seems so clearly to accord with the statute that it is deemed proper to ask the consideration of the Court to the following acts and decisions.

"The modes of proceedings in this Court shall "be the same in each State respectively, as are "now used or allowed in the Supreme Court of "the same."

Act of May 8, 1792, chap. 36, 2d Sess., 1 St. at L., 275.

Act of Sept. 29, 1789, 1 St. at L., 94.

See *non suit*, Burrill's Law Dict.

Clements *vs.* Benjamin, August 1815, 12 John. 299, non-suit by a *justice* sustained.

Pratt *vs.* Hull, August 1816, 13 John. 334; non-suit declared to be the duty of the Court, against the refusal of plaintiff.

Foot *vs.* Sabin, May 1821, 19 John. 155, same point.

Stuart *vs.* Simpson, Oct. 1828, 1 Wend. 378, same point,

Healey *vs.* Utley, August 1823, 1 Cowen 245. S. P. See Counsel Arg. at p. 351.

Foot *vs.* Sabin, 19 John. 158, Spencer, J.

In the case of Pratt *vs.* Hull, 13 John 334, it was decided that a Court of Common Pleas may compel a party to be non-suited without and against his consent, when in their opinion the evidence offered by him does not support his action, and there are no questions of fact to be weighed and considered by the jury. It was also decided in that case, that a bill of exceptions would lie to the decision of the Common

Pleas upon a motion for a non-suit, if such opinion was upon a mere matter of law arising upon facts not disputed. " * * if a Court can rightfully non-suit a plaintiff upon an undisputed state of facts when the law is against him, they ought to do so, and the refusal to do it is an error in point of law. It ought not to be left with the Common Pleas to non-suit the party when he has entirely failed to make out his case, or to omit to do it, capriciously. In the case last cited, we say that the power of non-suiting the plaintiff must be vested in the Court; that it results necessarily from their being made the judges of the law of the case when no facts are in dispute, and that otherwise there is no meaning in what has been considered a salutary rule in courts of justice, that to questions of law the Judges are to respond.

In Labar *vs.* Koplin, (4 N. Y. 547, April, 1851), Mullet, J., says: "According to the practice of the English Courts, a plaintiff cannot be non-suited on the trial against his assent, but may insist on the cause going to the jury and thus take his chance of a verdict (Grahams, Pr., 2d ed, 311). With us, however, a plaintiff may be compelled to be non-suited on the trial when the evidence offered by him is clearly insufficient to support his action, there being then no question of fact to be decided by a jury. This power of the courts to non-suit the plaintiff, results from their being the judges of the law in the case, when no facts are in dispute (Pratt *vs.* Hill, 13 John 334).

Lastly.—The judgment should be reversed.

JAS, C. CARTER,
Atty. for Plaintiff in Error.

Supreme Court of the United States.

THE MERCANTILE MUTUAL INSURANCE COMPANY,
Plaintiff in Error,

versus

BENJAMIN F. FOLSOM,
Defendant in Error.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

CASE.

The action was brought on a policy of marine insurance, issued by the plaintiff in error, for the sum of three thousand dollars, on the schooner "B. F. Folsom." Her value was agreed in the policy at thirty-five thousand dollars. The policy was dated and issued March 1, 1869; was a time policy on the vessel; and by its terms was to commence on the 1st day of January, 1869, and to expire on the 1st day of January, 1870 (Record, pp. 6, 7 and 8) The declaration (Record, fols. 3 to 11), is the usual one on a policy of marine insurance, to which the plaintiff in error pleaded the general issue (fol 12).

The cause was tried in the Court below without a jury, the jury having been waived by a stipulation duly filed, pursuant to the Act of Congress of March 3, 1865 (Record, fol. 13). The Court made a general finding in favor of the defendant in error for the amount of the policy, with interest (fol. 60).

At the trial the defendant in error, after introducing in evidence the policy of insurance, proved by Captain John Orlando, the master of the schooner "B. F. Folsom," her departure on her last voyage from Boston, bound to Montevideo and Buenos Ayres, on January 6, 1869; the incidents of her loss; and of his being picked up at sea; and of his writing to the defendant in error by the first mail which left Bremerhaven, the port where he was taken to by the vessel which rescued him; and of his inability, by reason of his not having any funds or credit, to send a telegraphic dispatch from Bremerhaven announcing the loss of the schooner (fols. 20 to 25). The letter written by Captain Orlando, under date of Bremerhaven, February 20, 1869, addressed to the defendant in error at Philadelphia, was post-marked on the day of its date in Bremerhaven, and bore the New York post-mark of March 9, 1869, (fol. 35). A second letter from Bremerhaven, from Captain Orlando to the defendant in error, was dated February 26, 1869, addressed similarly to the first, bore the Bremerhaven post-mark of February 27, 1869, and the Philadelphia post-mark of March 14, 1869 (fols. 37 to 43). The counsel of the plaintiff in error having admitted that on April 6, 1869, the proper preliminary proofs of loss and interest, required by the terms of the policy, had been served by the defendant in error, the latter rested his case (fol. 43).

The counsel for plaintiff in error then asked the Court to decide that the evidence adduced was not sufficient to entitle the defendant in error to a verdict. The Court declined so to rule, and the counsel for plaintiff in error duly excepted (fols. 44 and 45); whereupon he offered in evidence the written application made prior to the issuing of the policy. Its reception was objected to on the ground that the application was merged in the policy, and because the plea was merely that of the general issue, and not that the policy was obtained by fraud or any misrepresentation. The Court sustained the objection, ruling *that at that time* the said evidence was inadmissible (fol. 47). The counsel for plaintiff in error then, either by admission or proof, established :

(*a.*) That on February 22, 1869, there was published in the various newspapers in the city of New York, as well as in two newspapers in Philadelphia, the following telegraphic dispatch: "LIVERPOOL, February 21st.—The Orlando, from Baltimore for Buenos Ayres, has been lost at sea. Crew saved, and landed at Bremerhaven" (fol. 48).

(*b.*) That when the application for insurance was made, and the policy issued, the defendant in error did not communicate to the Company his knowledge of that dispatch (fol. 50).

It was further admitted by the plaintiff in error that it took the newspapers containing such despatch at it office in the city of New York; that ti kept a disaster book, in which this very despatch was posted by a clerk whose duty it was to post in such book notices of all marine disasters, and over which despatch was written in large letters the word "Orlando." The plaintiff in error also admitted that there was such a vessel as the "Orlando;" that the defendant in error had known a vessel by such name about two years prior to the insurance being effected on the "B. F. Folsom," she being owned by his then partner, but that since the dissolution of the partnership, to wit, about three years prior to the bringing of this suit, he had not known of her whereabouts, or in what trade she was sailing (fols. 49 and 50).

It appeared also that the Company knew that the name of the master of the schooner "B. F. Folsom" was "J. Orlando" (fol. 50).

The counsel for the plaintiff in error then again offerred in evidence the said application, but on objection of the counsel for the defendant in error, the Court ruled it out, to which ruling the counsel for the plaintiff in error duly excepted (fol 50).

The plaintiff in error did NOT prove that at the time of the application for the insurance, or of the issuing of the

policy, the defendant in error failed to communicate to it the fact that the "B. F. Folsom" was bound on a voyage from Boston to Montevideo and Buenos Ayres, or that the name of her master was John Orlando, or that either of such facts were, in its opinion as underwriters, material for it to know.

The counsel for the plaintiff in error then requested the Court below to make certain rulings, which will be found at fols. 51 to 59. There were exceptions to the refusal of the Court to make such rulings, as well as to the refusal of the Court to make any special findings of fact (fol. 68).

The opinion of the Court below, in deciding the case, will be found reported in 8 Blatch., C. C. R., 170.

The plaintiff in error then moved for a new trial, which motion was denied, and the opinion given on so deciding such motion will be found reported in 9 Blatch., C. C. R., 201.

The plaintiff in error, having pleaded merely the general issue, requested, as above stated, the Court to rule on numerous propositions, and which may be substantially stated as follows:

First.—That as the loss occurred before the issuing of the policy, and the words, "lost or not lost," were not contained therein, the insurance never took effect, and that, therefore, the defendant in error could not recover.

Second.—That at the time of the application for insurance, and the issuing of the policy, the defendant in error ought to have communicated to the plaintiff in error—

(*a.*) The existence of the despatch appearing in the newspapers.

(*b.*) That he had seen it.

(*c.*) The surmises or conjectures, if any, which he had with reference to the same.

Third.—That it was incumbent upon the defendant in error *to prove affirmatively* that at the time of application for insurance, and of the issuing of the policy, he had communicated to the plaintiff in error the information that the "B. F. Folsom" had sailed on a voyage from Boston to Montevideo and Buenos Ayres, and that the name of her master was John Orlando.

Fourth.—That the master having failed to advise the defendant in error, by telegraph, of the loss of the schooner, the latter could not, therefore, under the circumstances, recover.

The counsel for the defendant in error respectfully insist that each one of the foregoing propositions are untenable; that the rulings of the Court below, in refusing to uphold such points, were correct; and that no exception lies to a refusal of a Court, before whom a case is tried without a jury, under the Act of March 3, 1865, to find any special findings of fact; and the following points are submitted in support of these positions:

I.

The policy of insurance was a time policy, dated March 1st, 1869, and by its terms was retroactive, *i. e.*, it was to take effect from January 1, 1869; the language of the policy being, "do make insurance and "cause to be insured, at and from the first day of "January, 1869, at noon, until the first day of Jan-"uary, 1870, at noon." That the intent, therefore, of the parties was, that it was to be what is commonly known as a "lost or not lost" policy, seems too apparent to need argument: if not, the clause in the policy that the insurance was to take effect two months prior to the date of the policy, would be nugatory; and the absurd result would follow that the assured

would be paying for insurance for two months when the insurance company ran no risk whatever.

The rule is well settled, both by elementary writers and the decisions of the Courts, that the clause, "lost or not lost," is not necessary in a policy in order to make it retroactive. It is sufficient if it appear by the description of the risk, and the subject of the contract that the policy is intended to cover previous losses. There can be no reason why a previous loss should prejudice the insurance, if both the insured and the underwriters were equally ignorant of the loss at the time.

1 Phillips on Ins., sec. 925.
2 Parsons on Mar. Ins., p. 44.
1 Arnold on Ins., p. 26.
3 Kent's Com., p. 259, marginal.

In the language of Mr. Justice Story, in *Hammond* vs. *Allen* (2 *Sumner*, 387, 396, *et seq.*): "The policy would be binding though the ship were lost at the time, and though the policy had not the words, 'lost or not lost.'"

II.

Was the defendant in error, under the circumstances of the case, bound to communicate to the underwriters, either:

(*a.*) The despatch above alluded to, and that he had seen it,

or,

(*b.*) His surmises or conjectures, if any he had, that the despatch referred to the schooner "B. F. Folsom," bound on a voyage from Boston to Montevideo and Buenos Ayres, and not to the

"Orlando," bound on a voyage from Baltimore to Buenos Ayres, to which it did refer.

(*A.*) It appeared that all the newspapers containing the despatch were taken at the Company's office in New York; that it kept a "Disaster Book," in which such disasters were always pasted; and such Disaster Book, when produced in Court, showed that the despatch in question was, on the very day of its publication in the newspapers, pasted by its clerk, whose duty it was to attend to such matters, in the Disaster Book, and the word "Orlando" written in large letters over it. Knowledge of such despatch was, therefore, proven to have been in the plaintiff in error.

(1.) The assured is not required to communicate to the underwriters facts which the underwriters themselves know, are presumed to know, or ought to know.

1 Phillips on Ins., secs. 571, 604.
2 Duer on Ins., 553, 557.
1 Parsons on Mar. Ins., 476.

(2.) Intelligence contained in newspapers, especially if such newspapers are proven to be taken at the place of business of the underwriter, need not be communicated to the underwriter by the applicant for insurance.

1 Phillips on Ins., sec. 604.
1 Parsons on Mar. Ins., 478.
3 Kent's Com., p. 357, 8th ed.
Greene *vs.* Merch. Ins. Co., 10 Pick., 402.

(3.) Again: the despatch, even if not brought home, *as it has been*, to the knowledge of plaintiff in error, was of such a nature as not to require the defendant in error to communicate it to them. It was, at best, intelligence of

a very indifferent nature, and its application to the subject matter insured very doubtful and remote. It neither gave the correct name of the vessel, her correct port of departure, or her correct first port of destination.

The rule is well settled that intelligence may be of so general and indifferent a nature, and its application to the subject so doubtful and remote, that the assured need not communicate it, though it may possibly relate to the subject insured.

1 Phillips on Ins., sec. 610.
Ruggles *vs.* General Int. Ins. Co., 4 Mason, 74.
Alsop *vs.* Com. Ins. Co., 1 Summer, 451.
Greene *vs.* Merch. Ins Co., 10 Pick. 402.

(*B.*) It will hardly be seriously contended that the defendant in error was bound to communicate to the plaintiffs in error his conjectures or surmises, if any he had, whether the dispatch referred to the schooner "B. F. Folsom," then bound on a voyage from Boston to Montevideo and Buenos Ayres, and not as it purported to the "Orlando," on a voyage from Baltimore to Buenos Ayres.

That he was not bound to communicate whatever opinion, surmise or conjecture he may have had, is elementary law.

1 Phillips on Ins., sec. 574.

III.

The plaintiff in error also claims, that the policy had been avoided by the concealment of material facts, viz:

in that the defendant in error failed to communicate to it that the "B. F. Folsom" had left Boston on a voyage to Montevideo and Buenos Ayres, and that the name of her master was J. Orlando, and that such facts, when coupled with the despatch in question, were material ones which the defendant in error was bound to communicate to it.

It is a sufficient answer thereto, to say:

(1.) That such a defence has not been pleaded.

(2.) *That such a defence has not been proved; the plaintiff in error having in fact introduced no evidence whatever on the subject.*

The defence of concealment of a material fact was an affirmative one to be established by proof on the part of the plaintiff in error. The burden to establish such a defence rests on them. The Court cannot presume such a defence. It must be affirmatively proved by the plaintiff in error—they must establish by proof:

(*a.*) That the fact which it says was concealed from it, was actually not communicated to it.

(*b.*) That such fact was material to the risk.

In the case at bar the plaintiff in error failed to introduce any evidence whatever on either of these required points.

It would be an anomaly in both law and reason for the Court to presume an affirmative defence.

Abundant authority can be found to sustain the foregoing views, deducible, as they

are, from reason. A few leading ones only will be cited:

In *McLanahan* vs. *the Universal Insurance Co.*, (1 *Peters*, 170,) the Supreme Court of the United States held that, whether or not the concealment of the time of the sailing of the vessel, whether fraudulent or not, and if not fraudulent whether material to the risk, was a question of fact for the jury to decide upon the evidence to be produced by the underwriters.

In *Ruggles* vs. *The General Interest Insurance Co.*, (4 *Mason*, 74,) which case was subsequently affirmed on appeal by the Supreme Court of the United States (12 *Wheaton*, 409,) Mr. Justice STORY said (*page* 81): "But the disclosure of the facts is not "proved to be material to the risk. This "is necessary; neither the Court nor jury "can presume it." And on page 84, the learned Judge said: "Fraud vitiates every "policy; but it is not to be presumed; it "must be proved, and the burden of proof "is on the underwriters."

In *Fiske* vs. *The New England Insurance Co.*, (15 *Pickering*, 310,) the learned Judge, in delivering the opinion of the Court, said (*page* 316): "The plaintiffs "certainly made out a *prima facie* case, "and must recover unless the defendants "rebut it by proof of a legal defence to "the action. They rely upon the concealment by the plaintiffs of the time of the "sailing of the vessel. * * * This "matter of defence must be satisfactorily "proved by the defendants. They must "prove that the time of sailing was a fact "material to the risk, and that the plain-

"tiffs withheld the information." The Court continues (*page* 317): "The defence "of concealment is nearly allied to fraud "and misrepresentation. It is not sufficient "to suggest it. The party alleging must "prove the fact. Mr. Roscoe states the "general rule very well: 'Where the issue "'involves a charge of culpable omission, "'it is incumbent on the party making the "'charge to prove it, although he must "'prove a negative; for the other party "'shall be presumed to be innocent until "'proved to be guilty.'—"*Roscoe on Evid.*, "52."

"But suppose," continues the Court (*page* "320), "the jury were of opinion that the "time of sailing was material to the risk, "then the defendants contend that the "burden was upon the plaintiffs to prove "that they communicated the fact. We "have already cited the opinion of a learned "jurist (Mr. Roscoe), that the negative "should be proved by the defendants under "such circumstances. They are to affect "the plaintiffs with a culpable omission of "duty. They are to remove the presump- "tion of law that the plaintiffs did their "duty and conducted themselves honestly "and properly. We think it was incum- "bent upon the defendants to satisfy the "jury that the plaintiffs withheld that in- "formation, if it were material to the risk. "* * *. There is no suggestion that the "plaintiffs made a false answer to any in- "quiry made by the defendants. If that "were proved the case would be clear for "the defendants. If the jury were satisfied "that the time of sailing was material, we "think they might well come to the conclu- "sion that the defendants had failed to

"show that the plaintiffs withheld that in-
"formation. If the point was left doubtful,
"then the defendants fail to make out a
"case of concealment."

The same doctrine is asserted by the Court of Exchequer, in the leading case of *Elkin* vs. *Janson*, (13 *M. & W.*, 655). In that case, although the jury found on the evidence that a certain fact which the plaintiff knew, and which he withheld from the underwriter, was material, the Court held that to constitute the defence of concealment on the part of the underwriter, it was the business of the underwriters not merely to prove the materiality of the fact alleged to have been concealed, but also the fact of the non-communication of the same. ALDERSON, B., in delivering the opinion, (*p.* 663), said: "I am of the same opinion, and think
"it clear that the issue upon this plea lay
"on the defendant. It is a necessary aver-
"ment in the plea, that the communication
"in question was not made. I take this
"plea to amount, as the plaintiff's counsel
"has fairly argued, to four propositions:
"*first*, that the facts relied on really ex-
"isted; *secondly*, that the knowledge of
"them was material to the underwriter, in-
"asmuch as it would have a tendency to
"raise or lower the premium on the policy
"about to be made; *thirdly*, that those facts
"were known to the plaintiff, and *fourthly*,
"that they were not communicated to the
"defendant. The defendant must make
"out every one of those four propositions,
"namely, that the facts stated were true,
"that they were material, and within the
"knowledge of the plaintiff, and that they
"were not communicated to himself."

PLATT, B., in the same case (*p.* 666), remarked: "I have no doubt that the burden "of proof in this case lay on the defendant. "He has pleaded that, at the time of the "making of the policy, the plaintiff wrong- "fully concealed from him a certain fact, "which the jury have found to have been "material for him to know before he exe- "cuted the policy. That is the form of "this plea, and in it is involved, the want "of communication of a fact which ought "to have been communicated to the de- "fendant. * * * It strikes me that "in all cases of fraud, the party alleging "it is bound to make out all the ingre- "dients necessary to establish it. In the "present case, the policy being proved, I "think it would be assumed that every- "thing was rightly done, and if the defend- "ant relied on a state of facts which in- "volved fraudulent conduct on the part of "the plaintiff, it was his duty to establish "them. * * * I think that, on the re- "plication *de injuria* to this plea, the bur- "den of proving, not only the materiality "of the fact relied on, but the non-com- "communication of it to himself, lay on "the defendant."

Again, the fact that the plaintiff in error knew that the name of the master was John Orlando, was admitted by it on the trial.

IV.

It is claimed by the plaintiffs in error, that it was the

duty of the captain to telegraph to the defendant in error the fact of the loss of the "B. F. Folsom," and by his not having done so, that the policy was vitiated.

(*a.*) The captain was not bound to use *extraordinary* means of communication. He is bound to use the *ordinary* means of communication.

Greene *agt.* Merchants' Ins. Co. (10 Pick., 407).
Andrews *v.* Marine Ins. Co. (9 John. 31).

(*b.*) It appeared that he wrote by the first mail; was penniless in a foreign country; that a telegram had to be prepaid, and that, therefore, even if it were his duty, he had not the ability to telegraph. Under the circumstances, the Court will, it is confidently submitted, hold that the captain did advise the defendant in error as soon as possible of the loss, and by the most expeditious means in his power.

(*c.*) But, even if under any and all circumstances, it was the master's duty to advise by telegraph of the loss, and he failed to do so, either wilfully or negligently, yet that circumstance alone will not defeat the right of recovery herein. Such is settled doctrine in the Courts of the United States.

Ruggles *agt.* General Interest Ins. Co., 4 Mason, 74.
Affirmed on appeal, 12 Wheat., 409.

(*d.*) The case of *Proudfoot* agt. *Montefiore*, (*Law Rep.* 2 *Q. B.*, 511), is a case clearly distinguishable from the one at bar. In that case it appeared that the plaintiff's agent at Smyrna was specially employed to ship and consign purchases of madder on account of the plaintiff. The ship was lost, with all her cargo, on the 21st of January, 1861, and the plaintiff's agent knew of the loss on the morning of the

24th, and sent a letter by the first mail, which left on the 26th, in which letter he actually stated that he avoided using the telegraph in order that an insurance might be effected. It appeared, in that case, also that a telegram announcing the loss of the vessel was posted at Lloyds' prior to the application for insurance.

Besides, this case stands by itself, and, as was admitted by Cockburn, Ch. J., in delivering the opinion of the Court, was decided in direct opposition to the doctrine as laid down by the Federal Courts in the case of *Ruggles* agt. *General Interest Insurance Co.*, (*ubi supra*).

V.

The requests to rule are, it is submitted, based exclusively on presumptions and inferences drawn from imagination, and unsupported by any evidence.

If presumptions are to be indulged in, the defendant in error may well claim that, as the plaintiffs in error have failed to offer any evidence of anything showing or tending to show a concealment of a material fact, (an affirmative defence to be by them proven) the *strong presumption arises that, as matter of fact no concealment of any material fact took place.*

Can it be supposed, for one instant, that intelligent underwriters in the City of New York, issuing a time policy on a vessel, dated March 1st, 1869, which was to be retroactive from the 1st of January, 1869, should fail to inquire from the assured the whereabouts of the vessel during those two months—

whether she was in port, or on what voyage she was then on?

If such inquiries were made, as in the nature of things they probably were, *how easy to prove* either that the defendant in error refused to answer such questions, or answered them untruthfully.

As, therefore, they failed to offer any evidence on the subject, presumptions, if indulged in, are all in favor of the defendant in error.

The presumption is that the insurers questioned the party upon all subjects which they deemed material, and all which were in the contemplation of the parties at the time; and beyond that, clearly a party is not bound to disclose.

Rawle *vs.* American Mut. Life Ins. Co., 27 N. Y., 295, 297.

VI.

As to the exception to the refusal of the Court to receive in evidence the application for insurance, we say the ruling was correct, because

(*a.*) The application was merged in the policy of insurance, *being alike in every respect.* The defence was not that the policy had been obtained by fraud or misrepresentation in such application contained. (See opinion of Court, 9 Blatchf., C. C. R., 201–2. Also Vandervoort *vs.* Columbian Ins. Co., 2 Caine's Rep., 155, 160; Higginson *vs.* Dall, 13 Mass., 96, 99; Jennings *vs.* Chenango Co. Mut. Ins. Co., 2 Denio, 75, 79; Flynn *vs.* Tobin, 1 Moody & Malkin, 367 (22 Eng. Com. Law, p. 547); Ins. Co. *vs.* Lyman, 15 Wallace, 664, 670.)

(*b.*) It was offered in evidence generally and not as a link in any avowed line of evidence (see same opinion).

(*c.*) If its object was that of showing that in the written application neither the voyage on which the schooner was bound nor the name of her master was filled in, we answer—

(1.) That, by itself, would be no proof that the same had not been communicated to the officers of the company when the application was made.

(2.) The application is not designed for those purposes, and has not even a blank calling for such information. It is the usual blank furnished by the plaintiff in error itself.

(3.) The blanks calling for the description (which make up the technical word "rating," and on which it is based) are never filled in by the applicant. The application, filled up in the body and signed by the applicant, is handed, first, to the officer of the company, who, before signing his name after the word " binding," hands it to their surveyor, who either fills up the blanks or answers the questions verbally to the officer, who thereupon fixes the premium and marks the application binding. In other words, the blanks referred to are to be filled in or answered by the officers of the plaintiff in error. Such is the universal and well-know practice in all marine insurance companies.

(4.) Again, even if admissible fer these objects, it was certainly inadmissible after the plaintiff in error had admitted that in the Lloyds' register used by it, both in the

years 1868 and 1869, the name and rating of the schooner "B. F. Folsom" appeared, as well as the fact that John Orlando was her master (see fol. 50), and the more especially when the plaintiff in error totally failed to introduce any evidence showing, or tending to show, that such concealment, if any took place, was material to the risk. (See Points II and III, *supra*.)

VII.

The exception to the refusal of the Court below to find special findings of fact, is untenable, for the reason that, by the Act of Congress referred to, at the option of the Court, the findings may be either general or special (Sec. 4 of Act of March 4, 1865, 13 Stat. at Large, pp. 500, 501).

The foregoing section provides that "the findings of the Court upon the facts, *which findings may be either general or special*, shall have the same effect as the verdict of a jury. The rulings in the Court in the case, in the progress of the trial, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error, or upon an appeal, provided the rulings be duly presented in a bill of exceptions. When the finding is special, the review may also extend to the determination of the facts found to support the judgment."

Judicial construction has been given to this section in—

Insurance Co. *vs.* Tweed, 7 Wallace, 44.
Generes *vs.* Bonnemer, 7 *id.*, 564.
Avendano *vs.* Gay, 8 *id.*, 376.
Norris *vs.* Jackson, 9 *id.*, 125.

Harden *vs.* Tweed, 9 *id.*, 425.
Cunningham *vs.* Richardson, 10 *id.*, 516.
Generes *vs.* Campbell, 11 *id.*, 193.
Kearney *vs.* Case, 12 *id.*, 276.
Bethell *vs.* Mathews, 13 *id.*, 1.
Dirst *vs.* Morris. 14 *id.*, 484.
City of Richmond *vs.* Smith, 15 *id.*, 429, 437, 438.

The result of these cases is that—

1. If there be a special finding, a writ of error will lie directly to the Supreme Court, by which not merely the exceptions contained in the bill of exceptions will become reviewable, but also the review "may extend to the determination of "the sufficiency of the facts found to support "the judgment." Just as the practice has long been settled in the case of a special verdict or on an agreed statement of facts.

2. If the finding be a general one, the Appellate Court will only review questions of law arising on the exceptions contained in the bill of exceptions, and the errors of law apparent on the face of the pleadings, and if the unsuccessful party desires a review of the facts, he can only get relief by making, in the Court below, a motion for a new trial on a case (as the plaintiff in error did in the case at bar.) Again, just as the practice has long been settled in the case of a general verdict.

In fact, the Act itself says: "The finding of "a Court upon the facts, *which may be either* "*general or special*, shall have the same effect "as the verdict of a jury."

VIII.

As it has been repeatedly decided that the Courts of the United States have no power to order a peremptory

non-suit, against the will of the plaintiff, it is not necessary to examine the grounds of the motion (Record, fols. 44 and 45).

Doe *vs.* Grymes, 1 Peters, 469.
DeWolf *vs.* Rabaud, 1 Peters, 476.
Crane *vs.* Morris, 6 Peters, 598.
Silsby *vs.* Foote, 14 Howard, 218, 223.
Castle *vs.* Bullard, 23 Howard, 172, 183.

IX.

The judgment should be affirmed.

CLARENCE A. SEWARD,
CHARLES M. DA COSTA,
Of Counsel for Defendant in Error.